Study J-111 April 5, 2004

Memorandum 2004-21

Statute of Limitations for Legal Malpractice: Discussion of Estate Planning Issues

In its study of the statute of limitations for legal malpractice, the Commission has been examining a number of points, including whether special rules are needed to prevent overly long exposure to claims of estate planning malpractice. The Commission received numerous letters on this topic from estate planning attorneys, which were analyzed in previous memoranda. At the June 2003 meeting, the Commission directed the staff to solicit comments from a broad spectrum of interested parties, including insurers. This memorandum reports on the results of the staff's efforts. The following documents are attached as exhibits:

The Commission is in the process of developing a tentative recommendation for circulation for comment. It needs to decide whether to incorporate special rules for estate planning malpractice into the tentative recommendation, as requested by the State Bar Trusts and Estates Section (hereafter, "Trusts and Estates Section").

The memorandum is organized as follows:

STATUTORY FRAMEWORK

Code of Civil Procedure Section 340.6 sets forth the statute of limitations for legal malpractice:

> 340.6. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

The provision establishes alternate limitations periods: (1) One year from when the client discovers or should have discovered the facts constituting the wrongful act or omission, or (2) four years from the date of the wrongful act or omission, whichever occurs first. The provision does not apply to an action against an attorney for actual fraud.

The alternate limitations periods under Section 340.6 are tolled (i.e., they do not begin to run) under a number of circumstances. Of particular importance with regard to estate planning malpractice, the limitations periods are tolled until the client suffers "actual injury." Typically, "actual injury" from estate planning malpractice does not occur until the client dies and the estate is distributed. *See Heyer v. Flaig*, 70 Cal. 2d 223, 230-34, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). Consequently, the limitations periods for estate planning malpractice may not even begin to run until long after the alleged malpractice occurs.

The meaning of Section 340.6(b), concerning "an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future," is not clear. Attorney Ronald Mallen, who helped draft the statute, believes it is a vestige of an early version of the legislation that became Section 340.6, which did not state that the statute would be tolled until the occurrence of actual injury. He says that "[p]robably, subdivision (b) was intended to toll the statute in common delayed damage situations, such as claims by beneficiaries of wills who are not damaged and whose causes of action do not arise until their testators die." Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166, 168 (May/June 1978). If so, however, it became unnecessary when subdivision (a) was amended to toll the alternate limitations

periods until the occurrence of actual injury. *Id*. Mr. Mallen believes that the courts "should recognize its legislative origin and candidly acknowledge that it is a vestige of an unfulfilled concept." *Id*.

ESTATE PLANNERS' CONCERNS AND PROPOSED SOLUTIONS UNDER DISCUSSION

The long period of potential exposure to estate planning malpractice is of great concern to estate planning attorneys. They maintain that the extended period of potential exposure is leading to steep rates for malpractice insurance, difficulties in obtaining such insurance (particularly tail coverage), departures of malpractice insurance companies from the California market, and reduction in the number of attorneys who do estate planning. They contend that these circumstances ultimately harm clients, because attorneys pass their insurance costs on to clients, and because some attorneys are uninsured and lack the resources to cover a malpractice claim. The estate planners also point to practical problems in litigating a claim for estate planning malpractice that is based on events occurring long ago, such as faded memories, lost documentary evidence, deceased witnesses, and difficulty obtaining information about practices prevailing when the attorney prepared the allegedly defective estate plan. For further information on the concerns of the estate planners, see Memorandum 2003-14, pp. 10-34 & Exhibit pp. 1-49, 52-80; see also First Supplement to Memorandum 2003-14; Memorandum 2002-13, pp. 8-20; Memorandum 2000-61; First Supplement to Memorandum 2000-61. These documents are available on the Commission's website at <www.clrc.ca.gov>.

The Trusts and Estates Section developed a proposal to address these concerns, which we have referred to as the "Notice of Termination Proposal." See Memorandum 2003-14, pp. 8-9. Under this proposal, an estate planning attorney would have an option to send a client a notice terminating the attorney-client relationship, urging the client to find new counsel to review and update the client's estate plan, and warning the client that the notice triggered a four year period to commence suit for malpractice. Any malpractice claim would have to be filed within four years from the date of the notice, regardless of when "actual injury" occurs.

Another approach mentioned in communications from the Trusts and Estates Section would be to establish a 5-7 year limitations period for estate planning malpractice, which would run from the date of a notice sent to the client on

completion of an estate plan. The notice would inform the client of the project's completion and the deadline for filing a malpractice claim. Presumably, the limitations period would not be subject to "actual injury" tolling. Memorandum 2003-14, pp. 28-29.

A further suggestion from some of the estate planners would be to establish a statute of repose running from completion of an estate plan. The statutory period would be between 2-15 years, after which no malpractice claim could be brought, regardless of the circumstances. See Memorandum 2003-14, pp. 30-31.

The proposed approaches would be harsh, in that they could bar a client or potential beneficiary from recovery for estate planning malpractice before any injury even occurs. The staff has suggested that a possible means of mitigating this harshness would be to establish a new State Bar fund similar to the Client Security Fund, which would be used to compensate persons who are barred from recovery for estate planning malpractice due to the short period in which to commence suit. The fund could be based on contributions from estate planning attorneys, and the new limitations period or statute of repose could be restricted to attorneys who contribute. See Memorandum 2003-14, p. 43.

For further discussion of proposed solutions, see Memorandum 2003-14, pp. 25-34.

LEGAL DEVELOPMENTS

Since the Commission last considered this topic, California courts have issued a number of decisions bearing on estate planning malpractice. In particular, in *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003), the California Supreme Court considered whether a less stringent standard of causation applies in a case for transactional malpractice than in a case for litigation malpractice. The court of appeal followed that approach, but the Supreme Court rejected it, concluding that "just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." *Id*. at 1244. Under that ruling, it will be more difficult for a plaintiff to recover for estate planning malpractice than it would have been under the less stringent standard that the court of appeal used.

In another recent case, the California Supreme Court considered whether a legal malpractice plaintiff may recover compensatory damages for lost punitive

damages (i.e., punitive damages that plaintiff allegedly would have recovered if plaintiff's counsel had not committed malpractice). *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 30 Cal. 4th 1037, 69 P.3d 965, 135 Cal. Rptr. 2d 46 (2003). Again, the Court sided with the attorney defendants, prohibiting such recovery. *Id*. at 1041, 1045.

Similarly, in an issue of first impression, the First District Court of Appeal recently considered "whether an attorney has a duty to beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend the will or to make a new will and whether the attorney also has a duty to beneficiaries to preserve evidence of that evaluation." *Moore v. Zeigler*, 109 Cal. App. 4th 1287, 1290, 135 Cal. Rptr. 2d 888 (2003). The court of appeal concluded that "the attorney owes the beneficiaries no such duties." *Id*. Like the preceding decisions, this case limits the exposure of an estate planning attorney and should therefore give some comfort to attorneys concerned about potential malpractice claims.

FURTHER INPUT FROM ESTATE PLANNERS

The Commission has received a number of new letters from estate planning attorneys. The content of these letters is described below. For the most part, the letters reinforce views previously expressed, rather than making new points.

Problems Faced By an Estate Planning Attorney

Attorney Gordon Lindeen points out that it is easy to second-guess an estate planning attorney and allege malpractice. "In hindsight, a good estate plan based upon information given to the attorney at the time of its creation can become a disaster a short time later." Exhibit p. 28.

Mr. Lindeen further points out that an attorney "cannot be expected to keep in mind the circumstances of every individual for whom he or she has created a Will or Trust or to whom he or she has given estate planning advice. *Id*. at 28-29. Rather, he believes that the client "must shoulder responsibility for keeping the estate plan up to date." *Id*. at 29.

Cost and Availability of Malpractice Insurance

Several letters voice concern about the cost and availability of legal malpractice insurance. For example, attorneys Simone Riccobono and Michael Garner of American Law Center, P.C., state that malpractice insurance rates

"have climbed tremendously partly due to the very lengthy statute of limitations, leaving attorneys attempting to help clients in this area too vulnerable for their entire life and beyond." Exhibit p. 1.

Along similar lines, former Brobeck, Phleger & Harrison partner Edmond Davis expresses concern regarding the dissolution of his former firm, which he left several years before it dissolved. He prepared many estate plans while at Brobeck, but has not heard from some of his former clients in many years. He writes that "[b]ecause of Brobeck's dissolution, I assume there no longer is any malpractice insurance coverage in existence." Exhibit p. 6. He queries how long the potential for a malpractice claim should continue to exist under those circumstances. *Id*.

Mr. Davis is now in his seventies and a member of a two-partner firm. He does not intend to retire in the foreseeable future, but he is concerned about the availability of tail coverage if that becomes necessary at some point. "Obtaining 'tail' coverage by our small firm could be very difficult, if not impossible." *Id*. According to Mr. Davis, if his partner decides to retire, "then there is a serious question whether we could obtain tail coverage at all . . . ." *Id*.

Estate planning attorney Gerald Gerstenfeld is also concerned about tail coverage:

> My current premium for a claims-made malpractice insurance policy is *approximately $10,000*. I am convinced that a significant part of that high premium is as a result of there being no effective statute of limitations for estate planning attorneys.
>
> I am age 72 and I have recently had to switch malpractice insurance carriers so as to obtain coverage for any liability I may have as a result of my referring matters to an attorney who has agreed to purchase my practice at my death, disability or retirement. If I am disabled or retired in less than three years, *it will cost me 250% of my then current annual premium to purchase tail coverage for an unlimited period*.

Exhibit p. 10 (emphasis added). Similarly, attorneys Simone Riccobono and Michael Garner warn that an attorney "cannot even retire and buy a tail to cover the length of the current statute of limitations." Exhibit p. 1.

Availability of Estate Planning Services

Messrs. Riccobono and Garner further warn that the extended period of exposure to claims of estate planning malpractice is inappropriate for mere negligence and is driving attorneys out of the field:

> While malpractice is foreseeable, the act of negligence should not create a cause of action to third parties in perpetuity. Negligence is just that, it is not an intentional harm that should have a criminal type statute attached to it. If we want to continue to have attorneys practicing in this area of the law, if we want to promote their service, we must provide an incentive for these attorneys to provide this valuable service to clients. We cannot continue to have the unending possibility of malpractice hanging over the heads of practitioners and their families.

Id. These comments echo concerns previously voiced by other estate planning attorneys. See Memorandum 2003-14, pp. 21-22.

Difficulty Litigating a Stale Claim Brought By a Non-Client After the Client's Death

Attorneys Kenneth Fransen and Kim Herold point to the difficulty of litigating a claim based on events in the distant past:

> Currently, an estate planning attorney has potential liability for an unlimited period. Claims are most often brought by the beneficiaries and may be based on documents that were prepared years ago. Many times claims are filed by beneficiaries who are unhappy with the distribution they are to receive under the document because it is different than they expected — though often exactly what the clients intended. Such actions also tend to be based on administrative decisions of trustees, often the surviving spouse and other client. Although the attorney many not have been involved in these administrative decisions, he or she is still involved in the claim.
>
> Often the supporting information and documents with which to respond to a claim are no longer available, the clients are dead, the attorney's memory is hazy and there are no other witnesses. Although our practice is to keep our estate planning files indefinitely, there are many estate planning attorneys that do not keep these files beyond their normal file retention schedule. The expense to store these files is enormous but to protect ourselves from liability we feel we have no other choice but to retain them.

Exhibit pp. 8-9.

Comments on Proposed Solutions

Mr. Davis encourages the Commission "to consider favorably an amendment to the legal malpractice statute of limitations sections dealing with erroneously drafted wills or trusts." Exhibit p. 5. In his opinion, "[s]ome statutory provision

which could alert clients concerning assertions of claims, and setting some reasonable period of time within which to assert claims, is essential." *Id*. Mr. Gerstenfeld likewise urges the Commission "to consider a reasonable period of time for which an estate planning attorney would be liable for malpractice." Exhibit p. 10. Messrs. Riccobono and Garner similarly ask the Commission to address "the almost endless statute of limitations for estate planning firms," without proposing a specific solution. Exhibit pp. 1-2.

Kenneth Fransen and Kim Herold support the concept that on completion of an estate plan, "the attorney would be required to send a notice to the client informing the client that any claims arising out of such services must be asserted by the client or the beneficiary within a certain period of time or else they are barred by the statute of limitations." Exhibit p. 8. They "feel that either a 5 or a 7 year limitation is acceptable." *Id*.

Attorney Gordon Lindeen suggests a statute of repose with a five year limitation. Exhibit p. 29. He explains that this "would be consistent with the commonly given advice that estate plans should be reviewed at least every five years." *Id*.

In his view, such an approach would be preferable to a notice-triggered limitation period:

> Based upon my work in the general practice of law, I have concluded that advising anyone that he or she has a right to file a claim within a given period of time substantially increases the likelihood that the individual will consider filing a claim even though he or she might not otherwise be inclined to do so. Giving notice to clients of the ability to file a claim is really an "open invitation" to the making of claims against attorneys.

Id.

INPUT FROM OTHER PERSPECTIVES

Although many estate planning attorneys have contacted the Commission regarding this study, the Commission has only begun to receive input from other perspectives. From the input received, however, it is already clear that the proposed limitations on liability for estate planning malpractice are controversial. The comments submitted thus far are discussed below.

Efforts to Obtain Input

To solicit broad input, the staff sent letters to the following organizations urging them to comment on the limitations period for estate planning malpractice: California Defense Counsel, Consumer Attorneys of California, Consumers Union, HALT, CALPIRG, California Department of Insurance, California Judges Association, and the State Bar Litigation Section. The staff sent a similar letter to Judge Arnold Gold (a probate expert), as well as to numerous plaintiffs' legal malpractice attorneys, defendants' legal malpractice attorneys, and a couple of legal malpractice attorneys who represent both plaintiffs and defendants. The staff obtained the names of these attorneys from an article in the *California Lawyer* magazine. Rosenthal, *Every Lawyer's Nightmare: Legal Malpractice Claims Rarely Succeed But That Doesn't Mean You Won't Lose Sleep Over Them*, Cal. Lawyer 23, 25 (Feb. 2002). Another article in the same magazine lists malpractice insurers. Howell, *Malpractice Insurance Report*, Cal. Lawyer 27, 28 (Feb. 2002). The staff sent letters to most of these insurers, as well as to the California Association of Professional Liability Insurers.

Comments Submitted

In response to the requests for input, the Commission received two comments that are sympathetic to the concerns raised by the estate planning bar. One of these was from attorney Ronald Mallen, who was instrumental in drafting California's statute of limitations for legal malpractice. Exhibit pp. 30-32. The other was from the Probate and Mental Health Committee of the California Judges Association (hereafter, "Probate and Mental Health Committee"). Exhibit p. 3. In addition, the Commission previously received comments from insurance broker Robby Savitch of Driver Alliant Insurance Services, who provided extensive information on malpractice insurance and urged the Commission to address the concerns of the estate planning bar. Memorandum 2003-14, Exhibit pp. 56-59.

The Commission also received input expressing outrage at the proposals to limit the statute of limitations for estate planning malpractice. In particular, the Commission received an extensive analysis from HALT, which describes itself as "a nonprofit, nonpartisan public interest group that pursues an aggressive education and advocacy program which challenges the legal establishment to improve access and accountability in the civil justice system." Exhibit pp. 14-27. HALT attorneys James Turner and Suzanne Mishkin also authored a *San*

Francisco Daily Journal article regarding the Commission's study. Turner & Mishkin, *Death Trap: Protecting Estate Planners From Malpractice Suits Will Hurt Clients*, S.F. Daily J. 4 (Jan. 30, 2004) (reproduced at Exhibit p. 35). In addition, three plaintiffs' legal malpractice attorneys expressed concern about the reforms proposed by the estate planners: William Gwire (Exhibit pp. 12-13), Dan Stanford (Exhibit p. 34), and Deborah Wolfe (Exhibit pp. 36-37). The Commission also received opposition letters from Herb Clough (Exhibit p. 4) and David Mikolajczyk (Exhibit p. 13), who appear to be nonlawyers, as best we can tell from a search of the California State Bar membership records. Previously, the Commission received comments from attorney John Perrott, who spoke out against the estate planners' proposals. Memorandum 2003-14, Exhibit pp. 50-51.

The newly received comments from sources other than estate planners are discussed below.

Comments in Support of a Special Limitations Period for Estate Planning Malpractice

The Probate and Mental Health Committee and attorney Ronald Mallen urge the Commission to attempt to address the concerns of estate planning attorneys regarding extended exposure to malpractice claims.

Comments of the Probate and Mental Health Committee

The Probate and Mental Health Committee cautions that "[l]itigation as to estate planning done long ago is much more likely, than most litigation, to be the subject of manipulation, and to be based on vague, questionable and self-serving testimony." Exhibit p. 3. The committee supports the Notice of Termination proposal developed by the Trusts and Estates Section. According to the committee, "[t]he proposal by the Trusts and Estate Section . . . that the attorney send something affirmative to the client to let the client understand the situation, and to begin the running of the statute of limitations, would provid[e] needed clarity, for both sides, as to issues of attorney malpractice." *Id*.

Comments of Ronald Mallen

Attorney Ronald Mallen played a key role in drafting Code of Civil Procedure Section 340.6; the structure of the statute is largely his idea. *See* Mallen, *Panacea or Pandora's Box: A Statute of Limitations for Lawyers*, 52 Cal. State Bar J. 22 (Jan./Feb. 1977); *see also* Mallen, *An Examination of a Statute of Limitations for Lawyers*, 53 Cal. State Bar J. 166 (May/June 1978). He is also an expert on legal malpractice,

having "litigated claims, mostly on behalf of lawyers, for over 30 years." Exhibit p. 30. He is a co-author of a leading, multi-volume treatise on the subject. R. Mallen & J. Smith, Legal Malpractice (5th ed. 2000).

Mr. Mallen has "great interest" in the Commission's study. Exhibit p. 30. He states that if he has a bias, "it is to have a statute of limitations that is effective." *Id*. He acknowledges that what is effective is in the eyes of the beholder. *Id*.

Mr. Mallen writes that Section 340.6 "attempted to provide a balance between the right of an injured person to pursue a remedy and for lawyers not to have to litigate stale claims." *Id*. In his opinion, the alternate one-year and four-year limitations periods in Section 340.6 have generally functioned well. *Id*.

Mr. Mallen admits, however, that "the one 'class' of lawyers, who have suffered with seemingly open-end liability, are the estate planners." *Id*. The problem is not a potential claim by a client, but a potential claim by a beneficiary. As Mr. Mallen explains,

> The client for whom the estate is prepared is subject to the four-year limitation period, because that person suffers actual injury in the form of having paid for legal services for a legal product that fails to meet the goal of the representation. In contrast, the usual claimant, a beneficiary, suffers no injury until a contingent event, typically the death of the testator or testatrix. Until that time, usually, the estate plan can be changed.

Id. at 30-31.

Mr. Mallen reports that Section 340.6(b), which was added in the legislative process, apparently was an attempt to "deal with the estate planning lawyer." *Id*. at 31. That subdivision provides:

> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

According to Mr. Mallen, the provision "always has been uncertain in its meaning and hardly achieves any legitimate goal." Exhibit p. 31.

Mr. Mallen has "seen and litigated the problems that arise from claims made for estate plans drafted over a decade and sometimes, two decades ago." *Id*. at 32. He reports that the "concerns about stale evidence are very common when estate planning lawyers are sued, when almost invariably the client is dead, and, because of the long passage of time, the lawyer may be dead." *Id*. at 31.

Mr. Mallen reviewed the various proposals discussed in Memorandum 2003-14, but none of them appeal to him. *Id*. In an apparent reference to the Notice of Termination Proposal, he points out that it would "involve a virtual (if not literal) 'passing' the client from lawyer to lawyer like the proverbial 'hot potato.'" *Id*.

He suggests two possible approaches. One would be "to provide an alternative occurrence limitation unaffected by the need for actual injury, which adequately contemplates a reasonable time for most estate planning documents to become effective." *Id*. As the staff understands it, under this approach the existing one-year and four-year limitations periods would continue to apply to estate planning malpractice, but would be supplemented by an additional limitations period that would not be subject to "actual injury" tolling. We are not clear on whether Mr. Mallen contemplates that this additional limitations period would be subject to tolling under the other circumstances enumerated in Section 340.6 (continuous representation, legal or physical disability, and willful concealment). If such tolling would continue to apply, that would be a significant difference between this approach and the statute of repose concept advocated by some of the estate planners. We have been assuming, perhaps erroneously, that the estate planners proposing a statute of repose intend it to supplement rather than replace the existing one-year and four-year limitations periods.

Mr. Mallen's second suggestion is to establish "an occurrence limitation for a specific time period, predicated upon the attorney providing an express, written statement that the client should seek review at that time." *Id*. He explains:

> For example, assume that estate plans should be reviewed every ten years. The statute would provide a ten-year occurrence limitation, without the need for actual injury, from the date of alleged wrongful act or omission. The condition for the statute would be the existence of a writing (maybe a clause in the estate plan document), which informs the client that the estate planning documents should be reviewed at the end of that time and that the attorney's legal responsibility concludes at that time.

Id. This is similar to the concept of establishing a 5-7 year limitations period for estate planning malpractice, which would run from the date of a notice sent to the client on completion of an estate plan, informing the client of the project's completion and the deadline for filing a malpractice claim. See Memorandum 2003-14, pp. 28-29; see also *id*. at 29-30 (Dwight Griffith's suggestion that every will or trust include a notice that the estate plan should be reviewed every five years).

Mr. Mallen does not make clear whether the proposed new notice-triggered occurrence limitation would replace, as opposed to supplement, the existing one-year and four-year limitations periods. If the new occurrence limitation would replace the existing limits, then it would at least theoretically benefit both estate planning attorneys and some clients. An estate planning attorney would have the benefit of a true outer limit on liability; a client who sustained actual injury would have more than the current one-year-from-discovery of the malpractice or four-years-from-occurrence of the malpractice in which to sue.

The staff is not sure, however, whether that would be sound policy. When the client has sustained actual injury, the existing one-year and four-year limitations periods may be adequate and there may be no need to afford further time for filing suit, during which the claim may become stale and more difficult to properly adjudicate. *But see* Code Civ. Proc. § 335.1 (two year limitations period for personal injury action). It may be better to supplement, rather than replace, the existing limitations periods, if that could be done in a manner that is fair to clients.

As Mr. Mallen acknowledges, however, the approach he proposes could be criticized for unfairly protecting lawyers. *Id*. He states that this "criticism is true, but is the nature of a statute of limitations, offset by the other policy considerations I have noted." *Id*. He further points out that "formalizing the desirability of estate planning review would ultimately be beneficial for the public," even if some persons view the reform as having been "intended to generate legal work for lawyers . . . ." *Id*. at 31-32. He closes by saying that "[t]here are no right or wrong answers to drafting a statute of limitations," and that he "agree[s] with the concerns of estate planners about the seeming indefinite liability." *Id*. at 32.

Comments Opposed to a Special Limitations Period for Estate Planning Malpractice

Of the comments opposing the estate planners' proposals, the most detailed and extensive analysis is from HALT, a nationwide organization that has worked extensively both in the area of estate planning reform and in helping victims of attorney misconduct obtain recourse. Exhibit p. 16. "As an organization that regularly hears from legal consumers about the obstacles they face when bringing legal malpractice actions arising out of estate planning errors, HALT is in a unique position to offer input about the impact that a shortened statute of

limitations would have on legal consumers and their beneficiaries." *Id*. In light of the extensive work HALT has done in the areas of legal malpractice and estate planning reform, as well as the feedback it has received from legal consumers for over a quarter of a century, HALT "urges the CLRC to resist the estate planners' self-interested desire for an unnecessary and harmful exception to the current statute of limitations in California." *Id*.

HALT raises numerous arguments in support of its position. *Id*. at 15-27. We have combined these into major themes for purposes of the discussion below, which also describes the concerns expressed by other opponents of the proposals to shorten the statute of limitations for estate planning malpractice.

Lack of Need for Reform

Several sources comment that the estate planning attorneys have not demonstrated a need for their proposed reforms. For example, David Mikolajczyk opposes the idea of restricting the statute of limitations for estate planning malpractice, because "the estate planners have not demonstrated any need for this change in California Law . . . ." Exhibit p. 33. In his opinion, "far from demonstrating the necessity of a shortened statute of limitations, the comments of estate planners amount to little more than exaggerated and speculative fears . . . ." *Id*.

Similarly, HALT writes that "[a]lthough many attorneys speculate that they may face litigation decades after drafting an estate plan, there has been no showing on the record of this hypothetical situation actually occurring and unduly prejudicing the rights of any practitioner." Exhibit p. 16. HALT further states that "[t]o avoid what is at best a speculative exposure, estate planning attorneys are willing to severely curtail the right of clients injured by their attorneys' negligence or incompetence to seek compensation through a common law legal malpractice suit." *Id*.

HALT's comments appear to overstate the situation. The estate planners' concerns about lengthy exposure to malpractice claims are not merely speculative. The Commission has heard from several sources, such as Mr. Mallen, Terence Nunan (who testified at several Commission meetings), and Bruce Givner (see Memorandum 2003-14, Exhibit p. 24), that claims for estate planning malpractice based on events in the distant past do occur and are difficult to litigate.

According to plaintiff's malpractice attorney William Gwire, however, such claims are infrequent:

> I do not think that the statute of limitations law as it presently applies to estate planning negligence should be further limited, narrowed or circumscribed. Much of the argument for or against further limitations seems to me to have little application in the real life world. I have never been approached by people who think they have a claim that dates back to an estate plan or will that is ten years old let alone twenty years old. The longest I have ever heard someone complain is on a plan that was about 6 years old. Consequently, I don't know that an estate planner's need to maintain expensive malpractice insurance for a long period of time is truly a serious problem.

Exhibit p. 12.

Mr. Gwire further reports that there is little likelihood that an estate planning attorney will be subjected to an unmeritorious malpractice claim. *Id*. at 13. He explains:

> [T]he claim that people will sue estate planners for silly reasons, or on minimal claims is absurd. Legal malpractice claims are among the most difficult and expensive to bring, and this particular area (estate planning negligence), is doubly difficult because of the often obscure and complicated nature of the claims. I don't know any competent malpractice attorney who even considers taking on any malpractice case unless there is a strong indication of negligence and significant damages, meaning in the six figure range, at the least. These claims are not frivolous. In fact, I (and I suspect most malpractice attorneys) get the majority, [if] not all their referrals from estate planning attorneys who are the first to spot the error and problem. They are not in the habit of referring out trifling cases and frankly are grateful for someone to come in and try and clean up the mess for them and the beneficiaries.

Id.

Similarly, HALT writes that as "an organization that hears every day from individuals who have suffered as a result of attorney misconduct, we can assure the CLRC that malpractice lawsuits are rarely frivolous." Exhibit p. 17. HALT says that "[i]f anything, malpractice is under-prosecuted because it is so difficult to find a plaintiff-side legal malpractice attorney." *Id*. HALT "regularly hear[s] from California legal consumers, particularly those in rural communities, who cannot find an attorney willing to sue another attorney." *Id*.

HALT further points out that "many harmed clients and beneficiaries do not even consider a malpractice case because they realize that the standard for proving malpractice is a very demanding one." *Id*. at 18. In HALT's experience, malpractice cases "are not brought simply because clients and beneficiaries have a whim to sue estate planners; they are brought only when the harm caused by an attorney has been so severe that it justifies the immense effort and expense required to litigate a lengthy malpractice action." *Id*.

HALT also says that the estate planners have no reason to complain about having to defend a claim based on events occurring many years earlier. According to HALT, the "asserted difficulty of litigating a stale claim is a false concern because capable estate planners keep their records up to date." *Id*. at 19. David Mikolajczyk echoes this sentiment. Exhibit p. 33. HALT explains that most clients update their estate plan from time to time, affording an opportunity to supplement or clarify the file if needed, and "in the rare circumstance in which a client does not wish to make updates, no capable estate planning attorney would let records lapse for decades without follow-up." Exhibit p. 19.

Even if that is true, however, it is not realistic to expect an attorney to fully document every interaction with a client and decision made in conjunction with an estate plan. The expense would be prohibitive. The documentation would also be inadequate to present the facts as perceived by witnesses other than the attorney, and would be insufficient to fully compensate for the lack of testimony from a client, attorney, or other important witness who died before adjudication of a malpractice claim. While it may be correct that an estate planning attorney is unlikely to face a frivolous malpractice claim based on events occurring long ago, it is not appropriate to altogether dismiss the difficulty of determining the truth regarding a claim based on stale facts, which is neither patently meritorious nor patently unmeritorious.

It is another matter, however, to conclude that such a situation arises with sufficient frequency, and the problems inherent in permitting a plaintiff to pursue such a claim are of sufficient magnitude, to warrant a special rule that could preclude recovery before an attorney's allegedly negligent conduct even results in injury. As quite a number of comments point out, the proposed reforms shortening the limitations period for estate planning malpractice would benefit attorneys but could be considered unfairly detrimental to clients and beneficiaries.

Fairness to Clients and Beneficiaries

HALT emphatically contends that the reforms under discussion would be unfair. HALT also points out that an estate planning error can be extremely damaging from both a monetary and an emotional standpoint, making it especially important not to adopt an unfair limitations period. We quote those comments at length here, because we find them especially compelling:

> [T]he estate planners' proposals would cause many — and perhaps most — clients and beneficiaries to go uncompensated for serious harm caused by a careless estate planning attorney. Remarkably, the vast majority of estate planning attorneys who submitted comments are outspoken about the alleged unfairness of the current statute of limitations, but completely ignore the inequities that a statute of repose and a notice-triggered time limit would pose to consumers.
>
> A statute of repose would begin to run as soon as an estate planning document is drafted and would lapse before most clients and beneficiaries would be able to detect attorney errors because defects are not generally discoverable until the client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age.
>
> A notice-triggered time limit is equally problematic. While the Notice of Termination informs clients that a statute of repose is starting to run, it does not alert beneficiaries to the urgency of examining the estate plan for attorney error. And, even if notice were required to be given to beneficiaries, the same problem exists as with the statute of repose: most defects are not discoverable until after the client's death and many beneficiaries would not yet have been born or be of adult age. Even putting these significant problems aside, the Notice of Termination essentially requires the client — and accessible beneficiaries — to retain a second attorney to review the documents so that the statute does not lapse before the malpractice is discovered. This additional cost to clients and beneficiaries is unjustified.
>
> . . . .
>
> Not only do estate planning errors account for a large portion of malpractice claims, they also are responsible for creating perhaps the most profound financial impact on victimized individuals. When someone seeks the assistance of an attorney to draft an estate plan, rather than relying on self-help materials, the estate is typically complex and quite valuable. An error by an attorney can have massive fiscal consequences. With so much at stake, it would be manifestly unfair to change the law so that fewer clients and beneficiaries can bring claims against careless estate planners.

> In addition to the profound financial consequences of estate planning error, the CLRC should also weigh the extreme emotional impact of this particular form of malpractice. Imagine the pain of an individual losing a loved one, discovering that an incompetent attorney made a major error 10 years ago in the loved one's estate plan and being deprived of funds the loved one intended for the individual to receive, and then, adding insult to injury during this most difficult time, being prohibited from filing any claim against the unscrupulous attorney simply because of a new, lawyer-inspired exception in the statute of limitations.

Exhibit pp. 21-22.

Other comments similarly focus on basic notions of fairness. For example, David Mikolajczyk writes that "exposure to malpractice lawsuits should be reduced by developing careful and prudent work practices just like all other professions, *not by precluding injured clients and beneficiaries from bringing legitimate lawsuits*." Exhibit p. 33 (emphasis added). In his opinion, "the cost of extending insurance coverage does not justify the need for a statute of limitations that would prematurely bar harmed clients and beneficiaries from bringing malpractice actions." *Id*. Consequently, he believes that the proposal of the State Bar Trusts and Estates Section "unduly prejudices the rights of injured clients and beneficiaries." *Id*.

Likewise, plaintiff's legal malpractice attorney William Gwire considers the proposed approaches unjust. He explains that if extended exposure to claims of estate planning malpractice is a problem, it "could be dealt with by pricing the estate plans to reflect the increased premiums these practitioners pay." Exhibit p. 12. "After all," he says, "why shouldn't the trustors bear the expense since it is their beneficiaries that are being protected." *Id*.

Further, in Mr. Gwire's experience, "estate planning errors represent some of the more egregious errors that [he] see[s], and more importantly, the mistakes have profound and significant consequences on the beneficiaries, as well as the trustees and the attorneys who are left to try and deal with a botched plan." *Id*. He cautions that "[h]aving recourse against a negligent attorney is critical to these people and the ability to do right by the trustors and to the beneficiaries." *Id*.

Along the same lines, Herb Clough considers it audacious to propose a shortening of the limitations period for estate planning malpractice. Exhibit p. 4.

Mr. Clough points out that it would be difficult for a potential beneficiary to guard against an error in estate planning:

> Does a citizen need to monitor every estate plan drafted which might possibly [a]ffect him at some future date?? How is he informed of the drafting of a plan?? How can he possibly know that he was adversely [a]ffected before the decedent's estate is distributed or at least before it is probated or otherwise made known to [a]ffected parties??

Id.

Plaintiffs' legal malpractice attorney Deborah Wolfe voices similar concern about the difficulty of detecting estate planning malpractice before the testator's death:

> [F]rom the point of view of the consumer of legal services (or the heirs and beneficiaries of the consumer) it defies logic to shorten the statute of limitations to a time when the manifestation of the malpractice is still many years from discovery. Any change in the law would have to accommodate a tolling period at least as long as a testator's life, for example. In most instances, until a testator dies, there is no way to determine whether the estate planner's work has caused any damage, whether or not it was within the standard of practice. There would ostensibly be no need to "check" the estate planner's work during the lifetime of the testator. Should a malpracticing lawyer not be held accountable for substandard practice simply because his or her mistakes were unknown until probate of a will or until a trust becomes irrevocable?

Exhibit p. 36.

Dan Stanford, another plaintiff's legal malpractice attorney, strongly opposes the proposals to restrict the statute of limitations for estate planning malpractice, because they "will severely harm clients and consumers of legal services in California." Exhibit p. 34. He also thinks that the proposals would give undue preference to estate planning attorneys:

> I do not believe estate planning lawyers should receive such special treatment in the form of a dramatic change in the current statute of limitations. In fact, given the fact that defects [in] estate plans are generally not discoverable until a client's death and probate of the estate, I believe estate planning attorneys should be subject to the same statute of limitations as all other attorneys.

Id.

Mr. Stanford further comments that the proposed reforms "are inconsistent with the California Supreme Court's recent ruling in the case of *Viner v. Sweet*, 30 Cal. 4th 1232 (2003)." *Id*. HALT attorneys James Turner and Suzanne Mishkin agree, contending that the combination of that ruling and the estate planners' proposals would make it practically impossible to recover for estate planning malpractice:

> [*Viner*] held that victims of transactional malpractice must demonstrate that they would have achieved a better result than the result that actually occurred. The estate planners' proposal requires clients and beneficiaries to prove the impossible: The attorney's negligence led to a negative result when, in actuality, no result has occurred. The estate planners' recommendation, coupled with the Supreme Court's decision, effectively precludes victims of estate-planning negligence from recovering.

Exhibit p. 35. HALT further points out that a client or beneficiary could not obtain restitution from the Client Security Fund or attorney discipline system run by the State Bar. *Id*. at 23; see also Exhibit p. 33 (comments of David Mikolajczyk). Thus, HALT warns, "clients and beneficiaries who are time-barred from bringing malpractice actions would simply be out of luck." Exhibit p. 23. Whether that would be a fair result, given the competing policy considerations, is a critical question for the Commission to resolve.

Limited Use of Statutes of Repose in California and Elsewhere

According to HALT, a "new statute of repose in the isolated area of estate planning malpractice would contradict long-established California jurisprudence disfavoring such statutes." *Id*.; *see also* Exhibit p. 33 (comments of David Mikolajczyk). HALT also says that such an exception "would be at odds with the California statute of limitations governing medical malpractice, which tolls until discovery of injury." Exhibit pp. 23-24; *see also* Exhibit p. 33 (comments of David Mikolajczyk). Further, HALT reports that the "vast majority of states do not have statutes of repose for estate planning malpractice." *Id*. at 26. In 2002, the staff found only a handful of states that have a statute of repose for legal malpractice. We are aware of only one state — Illinois — with a special limitations period for estate planning malpractice, and that provision *exempts* estate planning malpractice from a statute of repose applicable to other types of legal malpractice. Memorandum 2003-14, Exhibit pp. 83-94; see Ill. Code Civ. Proc. § 13-214.3(d); *Petersen v. Wallach*, 198 Ill. 2d 439, 443 n.1, 764 N.E.2d 19, 261 Ill. Dec.

728 (2002); *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997); *Poullette v. Silverstein*, 328 Ill. App. 3d 791, 795 n.1, 767 N.E.2d 477, 263 Ill. Dec. 26 (2002).

It does not seem necessary, however, to get into the details of these jurisprudential arguments here. Suffice it to say that statutes of repose are not commonplace, because they can bar recovery for harm before a cause of action even arises. They are used only where compelling policy considerations are deemed to necessitate such an approach. The Commission needs to focus on whether the policy considerations in the context of estate planning malpractice in California warrant such treatment.

Effect of the Proposed Reforms on Preparation of Estate Plans

HALT claims that "the statute of repose and the notice-triggered time limit could actually encourage individuals to delay estate planning until they believe they are approaching death, so that they can preserve their beneficiaries' right to sue for common law malpractice." Exhibit p. 22. HALT says that this "could result in a large population of individuals who die without wills or trusts because they were waiting until the eleventh hour to have an attorney draft the estate plan." *Id*.

The staff is not convinced that this problem is likely to occur. It seems improbable that a significant number of people will be so concerned about preserving their beneficiaries' right to sue for common law malpractice that they allow it to dictate when they prepare their estate plans.

Alternative Means of Addressing the Concerns Relating to Malpractice Insurance

Many estate planning attorneys complained of the high cost and limited availability of malpractice insurance. Memorandum 2003-14, pp. 12-19. In response, HALT asserts that the "problem is not the expense of malpractice insurance; the problem occurs when attorneys draw up estate plans — legal instruments that are often the most important and precious to clients and families — without possessing the requisite skill and experience or exercising the necessary care." Exhibit p. 18. HALT cautions that the limitations period for legal malpractice "should not be dramatically altered simply to immunize the possible errors of inexperienced and incompetent attorneys." *Id*. Rather, "[e]xposure to malpractice lawsuits should be reduced by developing careful and prudent work

practices, not by precluding injured clients and beneficiaries from bringing legitimate lawsuits." HALT, Exhibit p. 17.

Presumably, HALT's point is that malpractice rates would go down and malpractice insurance would be more readily available if attorneys exercised more care in preparing estate plans than they currently do. That is not an answer, however, for an attorney who is already practicing carefully but having difficulty finding affordable malpractice insurance. Although such an attorney can sometimes help avert harm when a fellow member of the bar is misperforming, it is our impression that much estate planning takes place under circumstances that fellow attorneys cannot police.

Another answer to rising insurance costs is to pass those costs along to clients, as attorney John Perrott describes:

> Complaints that attorneys are not entering estate planning, or that malpractice insurance is too high, will simply lead to the cost of a trust rising. The customer will, ultimately, pay for all the costs associated with the product, just like any other. Lowering the standards to allow more people to afford estate planning is a bad idea, because it will really only protect the bad attorneys. The good attorneys will, in time, raise their rates to cover the costs.

Exhibit p. 19; Memorandum 2003-14, Exhibit p. 50.

HALT perceives no detriment to the public from increasing estate planning fees to cover the cost of malpractice insurance:

> If an estate is quite valuable and the attorney is well-qualified, the increased rate should make little difference to the client. If, on the other hand, an estate is small, self-help materials and other more affordable nonlawyer alternatives might be a better way of managing the estate. Therefore, any concern about the current statute of limitations being a detriment to clients is wholly unjustified.

Exhibit p. 20.

In making these comments, HALT neglects to acknowledge that some estates may fall into a middle ground, being big enough to require attorney assistance, but not so big that the client can readily absorb an increase in legal fees. HALT may thus be incorrect in dismissing the possibility that rising malpractice insurance costs will have a negative impact on the availability of affordable estate planning services for persons who require such help. See Exhibit p. 19.

Plaintiffs' legal malpractice attorney Deborah Wolfe warns that the solutions proposed by the estate planners will be ineffective to resolve the problem of high malpractice insurance rates. She writes that "the proposed solutions from the estate planning bar seem mainly to deal with limiting the liability of attorneys and necessarily short-changing potential plaintiffs." Exhibit p. 36. She believes that "the focus should shift to the liability insurance carriers." *Id*. She points out that even if the liability of an estate planning attorney were limited to a time period short of when the attorney's malpractice might be discovered, there is no guarantee that insurance premiums would be reduced. *Id.*

She uses the Medical Injury Compensation Reform Act ("MICRA"), 1975 Cal. Stat., 2d Ex. Sess. ch. 1, to demonstrate the problem:

> One only has to look at the disastrous MICRA provisions in California law, limiting liability of health care professionals, to see that passing the burden to injured plaintiffs is not the answer to lower malpractice premiums. MICRA has resulted in countless numbers of legitimately injured people being unable to receive just compensation for their injuries. *It has not caused malpractice insurance premiums for health care professionals to diminish in the slightest. In fact, California's medical malpractice insurance premiums are the highest in the nation, and have been for years*. Any revisions in the law that are made in anticipation that malpractice premiums will somehow diminish would be in vain, in my opinion, unless the revisions are tied with some "caps" on premiums in exchange. Good luck getting the carriers to agree to that . . . .

Id. at 36-37 (emphasis in original).

In summary, Ms. Wolfe warns that "[s]hifting the burden of malpractice to clients by artificially shortening the statute of limitations should be a plan of last resort, and in any event, is no panacea for the problem of the rising cost of malpractice insurance." *Id*. at 37. She takes a dim view of the situation, cautioning that "[u]ntil the law is changed to disallow insurance carriers from shifting responsibility for poor investment decisions to their insured, there doesn't seem to be any just solution to the problem posed in your letter." *Id*.

HALT is less pessimistic. While it disagrees with the arguments of the estate planners, it suggests the possibility of exploring malpractice insurance reform:

> Arguments raised by the estate planners amount to little more than exclamations of self-pity, antagonism toward clients, exaggerated alarm and groundless speculation. They do not demonstrate any need for a radical departure from long-settled

> California jurisprudence. *Before considering such a drastic move, private market alternatives, such as a self-insurance cooperative for estate planners or a voluntary compensation fund for those shielded by the statute of repose, should be exhausted.*

Id. at 21 (emphasis added). HALT points out that if a statute of repose or short limitations period is adopted, and a new fund is established to benefit victims of estate planning malpractice who are unable to recover due to the time bar, "such a new fund must extend to the full range of malpractice and cover attorney negligence, not merely dishonesty and fraud." *Id*. at 21 n.1. HALT further states that "any such fund should not place a cap on the amount that a victim could be reimbursed." *Id*.

It is encouraging that HALT would give thought to conditions for implementing such an idea, because the State Bar has begun to explore possibilities of legal malpractice insurance reform and related ideas.

STATE BAR STUDY OF MALPRACTICE INSURANCE

In the past few years, legal malpractice insurance costs have risen steeply, numerous carriers have left the California market, and California attorneys have had increasing difficulty obtaining malpractice coverage. Memorandum 2003-14, pp. 12-19, 35-36. This tight market for malpractice insurance is a reoccurring problem; similar conditions existed in the mid-70's and late 80's. On both of those occasions, there were efforts to establish a mandatory malpractice insurance program in California, but the efforts were unsuccessful. Due to the current tight market, the State Bar has again begun to explore creative ways of alleviating the malpractice insurance crisis.

For instance, the Bar has made efforts to obtain information from the insurance brokerage industry "on a potential joint venture in which the bar would serve as an agency, sharing workload and fees with an established broker/agent." *Malpractice Coverage Is an Ongoing Concern*, Cal. Bar J. 20 (June 2003). "As a first step towards meeting the challenges of a mandatory program, the joint venture concept would provide the opportunity for the bar to develop the necessary expertise to manage a large program and gain the confidence of the membership to consider such a program." *Id*. If the concept is well-received, "the bar ultimately may become a stand-alone agency and would offer a full range of insurance benefits to its members." *Id*. According to Starr Babcock, a special assistant to the Bar's executive director, benefits of having the Bar act as an

insurance agency could include "increased revenue, a shared risk pool, the ability to make clients whole prior to the disciplinary process, and an incentive for lawyers to call early for help with practice problems." *Id*. He acknowledges, however, that the obstacles to establishing such a program are "breathtaking." *Id*. Still, such an idea has been successfully implemented in Oregon, and other states are exploring the concept. *Id*.

The staff recently contacted Mr. Babcock to discuss the status of the Bar's work on insurance reform. He reported that the Bar is continuing to actively explore the issues, is very interested in the area, and is searching for creative solutions to the problem of high insurance rates and limited availability of malpractice insurance, particularly for certain types of coverage. He was interested to hear about the concerns raised by the Trusts and Estates Section in the context of this study, and said he would contact the Section Coordinator to discuss the matter.

ANALYSIS AND RECOMMENDATION

From the input received thus far, it is obvious that many estate planners are seriously concerned about extended exposure to malpractice liability and difficulties maintaining affordable insurance coverage. As yet, the Commission has heard from fewer sources speaking for clients and beneficiaries, but the comments it has gotten make clear that there will be resistance to the reforms proposed by the estate planners. Persons with that perspective are less well-organized than the estate planners on this issue now, but we expect HALT and perhaps other consumer-oriented groups and individuals to mount substantial opposition if any of the suggested reforms are introduced in the Legislature.

In short, it is clear that the area is controversial, and that the reforms currently proposed by estate planners would be challenged as one-sided, self-interested, and anti-consumer. The debate is also likely to be contentious, as foreshadowed by some of HALT's inflammatory comments, such as its attack on attorney Paula Matos and its accusation that the estate planners are guilty of "exaggerated cries of self-pity" and "exaggerated 'Chicken Little' cries that 'the sky is falling.'" Exhibit pp. 18, 20.

Pursuing such a reform would consume extensive Commission resources. If any of the estate planners' proposals were presented as currently framed, it

probably would founder in the Legislature and harm the reputation of the legal profession and the Commission.

The staff is convinced that it is necessary to develop a more balanced approach, one that would benefit clients and beneficiaries, as well as estate planning attorneys. As yet, however, none of the ideas that the Commission has been exploring in this study would serve as an effective counterbalance to the proposals of the estate planners.

The idea that comes the closest is the concept of revising Code of Civil Procedure Section 340.6 to incorporate the doctrine of equitable tolling — i.e., tolling during the pendency of an underlying claim that is the potential basis for malpractice recovery. See Memorandum 2002-13, pp. 3-6. But such a reform can be viewed as benefiting attorneys, as well as clients. It would spare a client from having to simultaneously prosecute a malpractice suit and underlying litigation; it would also spare an attorney from facing a malpractice suit that might not materialize depending on the outcome of the underlying litigation. Given a choice, most lawyers would prefer to have a malpractice suit delayed until the underlying litigation is resolved. *See* Mallen, *Limitations and the Need for "Damages" in Legal Malpractice Actions*, 60 Def. Counsel J. 234, 248 (1993). Thus, the proposed equitable tolling reform is not sufficiently one-sided to counterbalance the estate planners' proposals.

Another concept would be to couple one of the estate planners' proposals with a reform extending the alternative one-year-from-discovery limitations period under Section 340.6 to two-years-from-discovery. That would parallel the newly established two year limitations period for a personal injury action. Code Civ. Proc. § 335.1. Such a reform is likely to be unpopular with attorneys other than estate planners, however, and it would not achieve justice in each attorney-client relationship (e.g., a client whose malpractice claim is barred by a statute of repose will not take comfort in knowing that the alternative limitations period under Section 340.6 is two-years-from-discovery, not one-year-from-discovery).

Rather than balancing one of the estate planners' proposals with another reform of Section 340.6, it might be more appropriate to couple such a proposal with a reform of a different nature. For example, the staff has previously mentioned the possibility of establishing a State Bar fund to benefit estate planning clients and beneficiaries who are victims of malpractice. Memorandum 2003-14, p. 43.

Alternatively, perhaps the estate planners' concerns could be satisfactorily addressed without changing the statute of limitations at all. It might be possible, for example, to establish a creative State Bar program that ensures the availability of affordable malpractice insurance to estate planners.

The staff is encouraged by the State Bar's efforts in the area of insurance reform and related issues. It is clear that the Bar is concerned about alleviating the malpractice insurance crisis while also protecting malpractice victims and thereby enhancing the reputation of the legal profession. This is exactly the type of problem that the State Bar should address to effectively serve its members. The Bar is also better positioned than the Commission to work on this type of problem, because the answer is not necessarily legislative and the Bar, unlike the Commission, can pursue non-legislative approaches, such as negotiating with insurance companies on behalf of its members collectively.

We therefore recommend that the Commission **(1) put this aspect of its study on hold and (2) urge the Trusts and Estates Section to work with the rest of the State Bar to develop an effective means of addressing the estate planners' concerns, which is sensitive to the interests of clients, not just attorneys.** If, after undertaking such efforts, the Trusts and Estates Section remains convinced that a statute of repose or other revision of Section 340.6 should be a component of the solution, it may then be appropriate to reactivate this aspect of the Commission's study of the statute of limitations for legal malpractice.

We further suggest that estate planners concerned about potential malpractice liability consider taking additional measures to safeguard against such liability, which may also benefit clients. This could mean, for example, sending out periodic notices to clients reminding them of the need to update their estate plans. Another possibility might be to include a warranty of limited duration in an estate plan, which would prominently state that the attorney warrants the documentation only for a specified period, after which the client is strongly cautioned to have the documentation reviewed and updated. Alternatively, perhaps it would be possible to prepare an estate plan that automatically becomes null and void as of a certain date, and to take steps to notify the client of that time limit. This might create problems, however, if a client forgets about the time limit or becomes incapacitated or incompetent before the documentation expires. We have not researched these options, but believe that estate planners

should give some thought to these or other nonstatutory means of reducing their exposure to estate planning malpractice.

Respectfully submitted,

Barbara Gaal
Staff Counsel

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September 15, 2003

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94353-4739
Attn: Barbara Gaal

Re: Statute of Limitations

To Whom It May Concern:

We recently read a very interesting article in the California Trusts and Estate Quarterly, entitled *Alert: Statute of Limitations for Legal Malpractice.* We were pleased to learn that there was finally some consideration being given to end the almost endless statute of limitations for estate planning firms.

We have a small estate planning firm and would hope that the Bar Association would take an active interest in protecting this very important area of the law and the attorneys who help support it. Malpractice insurance rates have climbed tremendously partly due to the very lengthy statute of limitations, leaving attorneys attempting to help clients in this area too vulnerable for their entire life and beyond.

While malpractice is foreseeable, the act of negligence should not create a cause of action to third parties in perpetuity. Negligence is just that, it is not an intentional harm that should have a criminal type statute attached to it. If we want to continue to have attorneys practicing in this area of the law, if we want to promote their service, we must provide an incentive for these attorneys to provide this valuable service to clients. We cannot continue to have the unending possibility of malpractice hanging over the heads of practitioners and their families. An attorney cannot even retire and buy a tail to cover the length of the current statute of limitations.

Doctors have a strong lobby for the benefits of the doctors and by their lobby has provided equitable accountability for the doctor and the patient, we must provide the same professional relief to attorneys who reach out to clients and respond to their testamentary wishes. We cannot leave the attorney *and his family* exposed until a year after the attorney's death. This creates the risk of litigation that has all but crippled our profession.

Please help attorneys practicing estate planning to stay in this area of law.

Sincerely,
AMERICAN LAW CENTER, P.C.

By: Simone "Ric" Riccobono
SR/egb

AMERICAN LAW CENTER, P.C.

By: Michael E. Garner

Enclosure
Cc: Randolph B. Godshall
Terence Nunan

California Judges Association

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SEVENTH FLOOR
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September 16, 2003

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94353-4739

RE: Study of Statute of Limitations for Legal Malpractice: Study J-111; Memorandum 2003-14.
Support LRC Recommendation

Dear Barbara:

The Probate and Mental Health Committee of the California Judges Association supports this proposal as providing a fair balancing of the interests of estate planning clients with the needs of the attorneys who do estate planning. Litigation as to estate planning done long ago is much more likely, than most litigation, to be the subject of manipulation, and to be based on vague, questionable and self-serving testimony.

The proposal by the Trusts and Estate Section (page 8 of the Memorandum) that the attorney send something affirmative to the client to let the client understand the situation, and to begin the running of the statute of limitations, would provided needed clarity, for both sides, as to issues of attorney malpractice.

Sincerely,

Robert L. Waring
Legislative Counsel

c: The Honorable Don Green, Chair, CJA Probate and Mental Health Committee

FAX: _1__ PAGES, INCLUDING THIS PAGE

FROM ***HERB CLOUGH***
40 DEODORA DR., ATHERTON, CA., 94027, USA
PH 650-325-7931 FAX 650-473-0970 email: hcclough@HOTMAIL.com

MAR 8, 2004

CALIFORNIA LAW REVISION COMMISSION FAX 494-1827

I CANNOT BELIEVE THAT THE CALIFORNIA BAR HAS THE AUDACITY TO PROPOSE A RESTRICTION OF THE TIME PERIOD FOR THE FILING OF MALPRACTICE CLAIMS AGAINST ESTATE PLANNING ATTORNEYS. I UNDERSTAND THAT THEY PROPOSE THE STATUTE OF LIMITATIONS START ON THE DATE OF DRAFTING THE PLAN !!

DOES A CITIZEN NEED TO MONITOR EVERY ESTATE PLAN DRAFTED WHICH MIGHT POSSIBLY EFFECT HIM AT SOME FUTURE DATE?? HOW IS HE INFORMED OF THE DRAFTING OF A PLAN?? HOW CAN HE POSSIBLY KNOW THAT HE WAS ADVERSELY EFFECTED BEFORE THE DECEDENTS ESTATE IS DISTRIBUTED OR AT LEAST BEFORE IT IS PROBATED OR OTHERWISE MADE KNOWN TO EFFECTED PARTIES??

I WOULD BE MOST INTERESTED IN THE COMMISSION'S ATTITUDE

SINCERELY

HERB CLOUGH

CC: SENATOR TED LEMPART
SENATOR BYRON SHER

Davis & Whalen LLP

553 South Marengo Avenue
Pasadena, California 91101-3114

September 3, 2003

California Law Revision Commission
Attn: Ms. Barbara Gaal
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: **Statute of Limitation for Legal Malpractice Relating to Estate Planning**

Ladies and Gentlemen:

I encourage you to consider favorably an amendment to the legal malpractice statute of limitations sections dealing with erroneously drafted wills or trusts. The present state of the law is inappropriate in dealing with estate planning documents, wherein the statute of limitations does not accrue or commence to run until the death of the client. A special provision should be made in the law because of the unfairness to estate planning practitioners. Following are examples of reasons to consider favorably a change in the law.

1. I was a partner at Brobeck, Pfleger & Harrison, LLP, which, as you probably know, closed its doors and was liquidated earlier this year. I drafted many wills and trusts for clients while I was at Brobeck. I was retired from Brobeck

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in 1999, and opened a small, two-partner, office in Pasadena. There are numerous clients of Brobeck for whom the only work I ever did was to draft estate planning documents. I have never heard from those clients, in some cases, in over 10 years. I have no idea whether those clients went to other attorneys to update their estate plans or whether they have not updated those estate plans.

Because of Brobeck's dissolution, I assume there no longer is any malpractice insurance coverage in existence. How long should the potential of claims continue to exist under those circumstances?

2. As above stated, I am now in a two-partner small office. We do have legal malpractice insurance. I am in my 70's and my present plan is to continue practicing law as long as my health permits. However, at my age, adverse health situations can appear very rapidly. Obtaining "tail" coverage by our small firm could be very difficult, if not impossible. If my partner should decide to retire, then there is a serious question whether we could obtain tail coverage at all, and for how long that coverage would continue?

Some statutory provision which could alert clients concerning assertions of claims, and setting some reasonable period of time within which to assert ~~claims~~, is essential.

Very truly yours,

Edmond R. Davis of
DAVIS & WHALEN LLP

ERD:jvm

cc: Randolph B. Godshall, Esq.
Sheppard, Mullin, Richter & Hampton LLP
Terence Nunan, Esq.
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September 30, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94353-4739
ATTN: Barbara Gaal

RE: Statute of Limitations for Unaccrued Claims of Errors and Omissions for Estate Planning Services

Dear Ms. Gaal:

We are writing this letter in support of a proposal to limit the period of time in which an estate planning attorney will be liable for an erroneously drafted estate planning document. We understand that the current proposal is that upon completion of the estate planning project, the attorney would be required to send a notice to the client informing the client that any claims arising out of such services must be asserted by the client or the beneficiary within a certain period of time or else they are barred by the statute of limitations. We further understand that the time period within which to file a claim is proposed as either 5 or 7 years.

We agree that there needs to be a statute of limitations for estate planning attorneys. We feel that either a 5 or a 7 year limitation is acceptable. We assume that like other statute of limitations there would be exceptions for fraud and gross negligence on the part of the attorney.

Currently, an estate planning attorney has potential liability for an unlimited period. Claims are most often brought by the beneficiaries and may be based on documents that were prepared years ago. Many times claims are filed by beneficiaries who are unhappy with the distribution they are to receive under the document because it is different than they expected – though often exactly what the clients intended. Such actions also tend to be based on administrative decisions of trustees, often the surviving spouse and other client. Although the attorney may not have been involved in these administrative decisions, he or she is still involved in the claim.

Often the supporting information and documents with which to respond to a claim are no longer available, the clients are dead, the attorney's memory is hazy and there are no other witnesses. Although our practice is to keep our estate planning files indefinitely, there are many estate planning attorneys that

do not keep these files beyond their normal file retention schedule. The expense to store these files is enormous but to protect ourselves from liability we feel we have no other choice but to retain them. Further, this lack of a statute of limitations significantly increases the cost of our errors and omissions insurance particularly for final insurance upon retirement.

We urge you to consider this proposal.

Very truly yours,

Kenneth J. Fransen

Kim Marie Herold

KMH:kh

cc: Randolph B. Godshall

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OF COUNSEL
MARK S. NOVAK
BASES & BASES, APC
MARK S. LEVIN

September 15, 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Attention: Barbara Gaal

Re: Absence of Statute of Limitations for Trusts and Estate Attorneys

Dear Sir or Madam:

Ninety percent of my practice is in the area of trusts, estates and probate.

My current premium for a claims-made malpractice insurance policy is approximately $10,000. I am convinced that a significant part of that high premium is as a result of there being no effective statute of limitations for estate planning attorneys.

I am age 72 and I have recently had to switch malpractice insurance carriers so as to obtain coverage for any liability I may have as a result of my referring matters to an attorney who has agreed to purchase my practice at my death, disability or retirement. If I am disabled or retired in less than three years, it will cost me 250% of my then current annual premium to purchase tail coverage for an unlimited period. If I retire or am disabled after three years, there is no charge for tail coverage.

I urge you to consider a reasonable period of time for which an estate planning attorney would be liable for malpractice. I am convinced that if you did so, my insurance premium would be reduced and, if that occurs, I might be able to afford to purchase unlimited tail coverage in the event of my disability or retirement before three years.

Thank you very much for your consideration of this matter.

Very truly yours,

GERALD F. GERSTENFELD

cc: Randy Godshall, Esq.
Terence Nunan, Esq.

GFG:ln

GWIRE
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March 20, 2004

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA. 94303

Re: Study of Statute of limitations for legal malpractice (pertaining to estate planning issues)

Dear Ms. Gaal:

Thank you for inviting me to comment on the above referenced matter.

I practice in the legal malpractice field on the plaintiff's side. I have handled several malpractice cases arising from estate planning negligence, and actually have two open cases at the moment. I have also been presented with and considered dozens more cases which I have elected, for one reason or another, not to take.

I do not think that the statute of limitations law as it presently applies to estate planning negligence should be further limited, narrowed or circumscribed. Much of the argument for or against further limitations seems to me to have little application in the real life world. I have never been approached by people who think they have a claim that dates back to an estate plan or will that is ten years old, let alone twenty years old. The longest I have ever heard someone complain is on a plan that was about 6 years old. Consequently, I don't know that an estate planner's need to maintain expensive malpractice insurance for a long period of time is truly a serious problem. Even if it were, I think the problem could be dealt with by pricing the estate plans to reflect the increased premiums these practitioners pay. After all, why shouldn't the trustors bear the expense since it is their beneficiaries that are being protected.

My experience, and my guess is that the experience of the majority of estate planners is that people wait until well into old age before they start planning their estate. Even if they do start early, plans get revised over the years.

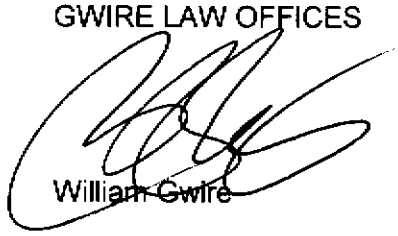
Additionally, in my experience, estate planning errors represent some of the more egregious errors that I see, and more importantly, the mistakes have profound and significant consequences on the beneficiaries, as well as the trustees and the attorneys who are left to try and deal with a botched plan. Having recourse against a negligent attorney is critical to these people and the ability to do right by the trustors and to the beneficiaries.

Finally, in my experience, the claim that people will sue estate planners for silly reasons, or on minimal claims is absurd. Legal malpractice claims are among the most difficult and expensive to bring, and this particular area (estate planning negligence), is doubly difficult because of the often obscure and complicated nature of the claims. I don't know any competent malpractice attorney who evens considers taking on any malpractice case unless there is a strong indication of negligence and significant damages, meaning in the six figure range, at the least. These claims are not frivolous. In fact, I (and I suspect most malpractice attorneys) get the majority, of not all their referrals from estate planning attorneys who are the first to spot the error and problem. They are not in the habit of referring out trifling cases and frankly are grateful for someone to come in and try and clean up the mess for them and the beneficiaries.

I hope that the above has been of some help.

Sincerely,

GWIRE LAW OFFICES



William Gwire

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

October 15, 2003

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Law Revision Commission study of statute of limitations for legal malpractice

Dear Ms. Gaal:

In response to your June 19, 2003 request for HALT's input, we are faxing our comments opposing a new estate planning exception to the current statute of limitations for legal malpractice.

If you have any questions or would like further input from our organization, please feel free to contact me at (202) 887-8255. Thank you again for your request and your consideration of the recommendation's impact on legal consumers.

Sincerely,

Suzanne M. Mishkin
Associate Counsel
SBN 217873

EX 14

1612 K STREET NW ■ SUITE 510 ■ WASHINGTON, D.C. 20006
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HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

October 15, 2003

COMMENTS OF
HALT, INC. *AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM*
TO THE CALIFORNIA LAW REVISION COMMISSION
IN OPPOSITION TO THE RECOMMENDATION
TO RESTRICT STATUTE OF LIMITATIONS
FOR ACTIONS BASED ON ESTATE PLANNING MALPRACTICE

Pursuant to the California Law Revision Commission's request of May 23, 2003, HALT – *An Organization of Americans for Legal Reform* hereby submits comments opposing the recommendation to establish estate planning malpractice exceptions to the current statute of limitations for legal malpractice actions.

The Trusts and Estates Section of the State Bar proposes a special exception to the current statute of limitations for legal malpractice in California. Among the Section's primary proposals are to impose, in place of the general statute of limitations:

(1) a statute of repose that would terminate liability seven to ten years after completion of an estate planning project; and

(2) a requirement that estate planning lawyers send a notice to the client of the completion of work together with the information that a claim would need to be asserted by the client or beneficiaries within five to seven years.

HALT objects to the proposed exceptions to the statute of limitations for the following four reasons:

(1) estate planners have not demonstrated any compelling need for this draconian change in the law;

(2) any shortening of the statute of limitations would impose significant burdens on and frequently cause detrimental consequences to clients and their beneficiaries;

(3) state bar programs offer no alternative recourse to clients and beneficiaries time-barred by a statute of repose; and

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(4) any new exception for estate planning malpractice would be a radical departure not only from long-established California jurisprudence but also from that of the vast majority of other jurisdictions.

Founded in 1978, HALT is a nonprofit, nonpartisan public interest group that pursues an aggressive education and advocacy program which challenges the legal establishment to improve access and accountability in the civil justice system. As part of our reform efforts, HALT has worked to help victims of attorney misconduct obtain recourse. HALT has written extensively on this subject and has published *Using a Lawyer: And What To Do if Things Go Wrong* and *If You Want to Sue a Lawyer: A Directory of Legal Malpractice Attorneys*. Most recently, HALT filed an *amicus curiae* brief in the California Supreme Court legal malpractice case, *Viner v. Sweet.*

HALT has also worked extensively in the area of estate planning reform, publishing a number of books on the subject, including *The Easy Way to Probate: A Step-By-Step Guide to Settling an Estate*; *Wills: A Do-It-Yourself Guide*; and *Your Guide to Living Trusts & Other Trusts: How Trusts Can Help You Avoid Probate and Taxes*. As an organization that regularly hears from legal consumers about the obstacles they face when bringing legal malpractice actions arising out of estate planning errors, HALT is in a unique position to offer input about the impact that a shortened statute of limitations would have on legal consumers and their beneficiaries.

In light of the extensive work we have done in the areas of legal malpractice and estate planning reform as well as the feedback we have received from legal consumers for over a quarter of a century, HALT urges the CLRC to resist the estate planners' self-interested desire for an unnecessary and harmful exception to the current statute of limitations in California.

I. Estate Planners Have not Demonstrated Any Need for this Radical Change in California Law.

Comments to the CLRC from estate planners do not establish the necessity for a drastic change to the statute of limitations for legal malpractice. Although many attorneys speculate that they may face litigation decades after drafting an estate plan, there has been no showing on the record of this hypothetical situation actually occurring and unduly prejudicing the rights of any practitioner. To avoid what is at best a speculative exposure, estate planning attorneys are willing to severely curtail the right of clients injured by their attorneys' negligence or incompetence to seek compensation through a common law legal malpractice suit.

Indeed, the only showing that *has* been made on the record is that there is absolutely no need for a change in the law. Attorney John Perrott reminds us that we should:

> ...use what already exists and is designed to solve this problem. The probate system allows a judge to review a will and then issue probate orders of distribution, which are final and, except in instances of extrinsic fraud, cut off the drafter's liability (Comments of John Perrott, Exh. 50).

This remedy provides estate planners with sufficient protection, yet nearly all the attorneys submitting comments – with the notable exception of Mr. Perrott – insist that a sweeping change in the law is urgently needed without providing any evidence that supports this assertion.

In proposing this unnecessary departure from current law, estate planners dismiss the fact that a seven to ten year statute of repose would lapse before most clients or beneficiaries would be able to detect attorney errors. As they well know, defects in estate plans are not generally discoverable until a client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age. Without clear evidence of the need for this special exception, the CLRC should reject a recommendation with such draconian consequences.

A. Exposure to malpractice lawsuits should be reduced by developing careful and prudent work practices, not by precluding injured clients and beneficiaries from bringing legitimate lawsuits.

The chief grievance raised by estate planners is that they may have to face possible malpractice claims brought years after completion of work on an estate plan. While all who submitted comments profess to being careful and professional estate planners who have never had claims filed against them, they nonetheless speculate that "it is only a matter of time" before they are sued (quote from Comments of Dwight Griffith, Exh. 29; see also Comments of Robert Goodwin, Exh. 28, Kelly Carroll, Exh. 8 and William H. Soskin, Exh. 72). Refusing to acknowledge that malpractice suits are rarities, estate planners instead groundlessly suggest that these claims are a common occurrence caused by clients and beneficiaries who are innately litigious and inclined to bringing frivolous lawsuits.

As an organization that hears every day from individuals who have suffered as a result of attorney misconduct, we can assure the CLRC that malpractice lawsuits are rarely frivolous. If anything, malpractice is under-prosecuted because it is so difficult to find a plaintiff-side legal malpractice attorney. We regularly hear from California legal consumers, particularly those in rural communities, who cannot find an attorney willing to sue another attorney.

In addition, many harmed clients and beneficiaries do not even consider a malpractice case because they realize that the standard for proving malpractice is a very demanding one. As the California Supreme Court recently ruled, plaintiffs in transactional malpractice cases – including estate planning malpractice – may only recover damages by showing that but for their attorney's negligence, they would have achieved a better result (*Viner v. Sweet*, 30 Cal. 4th 1232, 1235 (2003)). Malpractice actions are not brought simply because clients and beneficiaries have a whim to sue estate planners; they are brought only when harm caused by an attorney has been so severe that it justifies the immense effort and expense required to litigate a lengthy malpractice action.

B. The cost of extended insurance coverage does not justify the need for a statute of limitations that would prematurely bar harmed clients and beneficiaries from bringing malpractice actions.

Many estate planners protested on the record about the "unfair" expense of professional liability insurance (Comments of Irwin Goldring, Exh. 25, Sandra Locke, Exh. 40, Donald Gary, Jr., Exh. 22, John Dundas II, Exh. 15 and James Walker IV, Exh. 77). One attorney, Paula Matos, states: "[T]wenty years later I still have to worry about the hundred or so estate plans I worked on as a fledging associate! And unless you do something about it, I will have to worry about it twenty years hence!" (Comments of Paula Matos, Exh. 42.) Ms. Matos went on to complain that the "specter of that Sword of Damocles still hanging over my gray and trembling head twenty years from now is not pleasant." Perhaps attorneys would not need to be so fearful if they did not undertake responsibility for the estate plans of families while acknowledging that they are merely "fledgling associates."

The problem is not the expense of malpractice insurance; the problem occurs when attorneys draw up estate plans – legal instruments that are often the most important and precious to clients and families – without possessing the requisite skill and experience or exercising the necessary care. The statute of limitations for legal malpractice should not be dramatically altered simply to immunize the possible errors of inexperienced and incompetent attorneys.

C. California law already limits an attorney's malpractice exposure to within one year of the attorney's death.

Some attorneys on the record even pose the specter of "a retired estate planning attorney who passes away and potentially has his estate or his heirs sued 20 years after his or her passing because the statute of limitations for malpractice in the estate planning area has not lapsed" (Comments of Daniel Crabtree, Exh. 13). This concern, as the Commission correctly noted, is without merit because any claim against the attorney's

estate must be brought within one year of the attorney's death. Cal. Code Civ. Proc. § 366.2.

D. The asserted difficulty of litigating a stale claim is a false concern because capable estate planners keep their records up to date.

Estate planners also complain that they will not be able to successfully defend a legal malpractice claim brought by beneficiaries after a client's death because "trying to recall client conversations and directions 30 or 40 years after the fact is virtually impossible" (Comments of William H. Soskin, Exh. 72). Instead of developing better methods for memorializing discussions with clients, estate planners would rather simply preclude them from bringing suits.

In addition, the fear that a plethora of suits will be brought 30 or 40 years after the completion of an estate plan defies logic. Most clients simply do not form an estate plan forty years before their death and never return to it with updates or amendments. Each time a client returns for a modification, the estate planner has an opportunity to review her previous work or ask the client to confirm or clarify an earlier instruction. And in the rare circumstance in which a client does not wish to make updates, no capable estate planning attorney would let records lapse for decades without follow-up. Indeed, many estate planners stated on the record that this is a regular part of their practice (Comments of Robert Goodwin, Exh. 28). We should not preclude legitimate lawsuits simply because an attorney's memory is faulty and she never made the effort to obtain clarification.

E. The current statute of limitations is anything but a "threat to the public."

Perhaps the estate planners' most astonishing assertion is that the current statute of limitations "is more of a threat to the public than a benefit" because it discourages attorneys from practicing estate planning (Comments of Maxine Burton, Exh. 1). In response to this insincere presumption, we share the views of attorney Perrott, who explains:

> Complaints that attorneys are not entering estate planning, or that malpractice insurance is too high, will simply lead to the cost of a trust rising. The customer will, ultimately, pay for all the costs associated with this product, just like any other. Lowering the standards to allow more people to afford estate planning is a bad idea, because it will really only protect the bad attorneys. The good attorneys will, in time, raise their rates to cover the costs. Please do not attempt to solve this problem with a band-aid. Keep attorneys liable, and thereby protect the reputation of the profession (Comments of John Perrott, Exh. 50).

Estate planners may respond that with the rise of self-help materials and other less expensive alternatives, they will be priced out of the market if they raise their rates to accommodate the cost of extended insurance coverage. If an estate is quite valuable and the attorney is well-qualified, the increased rate should make little difference to the client. If, on the other hand, an estate is small, self-help materials and other more affordable nonlawyer alternatives might be a better way of managing the estate. Therefore, any concern about the current statute of limitations being a detriment to clients is wholly unjustified.

F. Far from demonstrating the necessity of a shortened statute of limitations, the comments of estate planners amount to little more than exaggerated and speculative fears.

Comments from many of the estate planners are startling in their hostility toward clients and their exaggerated cries of self-pity. Attorney Lynn Stutz's comments reflect the perspectives of many estate planners on the record, when she complained:

> All of the onus is on the attorney.... But the clients and their families can wait as long as they like to search for and find a mistake. They can wait until the lawyer is no longer able to fix the problem, which if discovered sooner could be remedied. They can wait until the only 'fix' is money.... There is no closure, no retirement, no true peace for the estate planning attorney" (Comments of Lynn Stutz, Exh. 73).

Perhaps this attorney should have found a different line of work. Lawyers who view their clients as adversaries should not be shaping professional liability policy in California, and their exaggerated "Chicken Little" cries that "the sky is falling" should be ignored by the CLRC.

The self-interestedness of the estate planners' position becomes abundantly clear with comments such as those provided by attorney Christopher Enge, who stated that a "side benefit" of the statute of repose is that "clients would be motivated to have their plans updated, to restart the statute of limitations" (Comments of Christopher Enge, Exh. 18). Under Mr. Enge's plan, clients would be forced to pay estate planners needless additional funds simply to preserve their own and their beneficiary's right to sue once the statute of repose lapses. A statute of repose translates into more business – and easy business – for estate planners.

* * * * *

Arguments raised by the estate planners amount to little more than exclamations of self-pity, antagonism toward clients, exaggerated alarm and groundless speculation.

They do not demonstrate any need for a radical departure from long-settled California jurisprudence. Before considering such a drastic move, private market alternatives, such as a self-insurance cooperative for estate planners or a voluntary compensation fund for those shielded by the statute of repose, should be exhausted. [1]

II. The Estate Planning, Trust and Probate Law Section's Proposal Unduly Prejudices the Rights of Injured Clients and Beneficiaries

As CLRC Staff Memorandum 2003-14 highlights, the estate planners' proposals would cause many – and perhaps most – clients and beneficiaries to go uncompensated for serious harm caused by a careless estate planning attorney. Remarkably, the vast majority of estate planning attorneys who submitted comments are outspoken about the alleged unfairness of the current statute of limitations, but completely ignore the inequities that a statute of repose and a notice-triggered time limit would pose to consumers.

A statute of repose would begin to run as soon as an estate planning document is drafted and would lapse before most clients or beneficiaries would be able to detect attorney errors because defects are not generally discoverable until the client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age.

A notice-triggered time limit is equally problematic. While the Notice of Termination informs clients that a statute of repose is starting to run, it does not alert beneficiaries to the urgency of examining the estate plan for attorney error. And, even if notice were required to be given to beneficiaries, the same problem exists as with the statute of repose: most defects are not discoverable until after the client's death and many beneficiaries would not yet have been born or be of adult age. Even putting these significant problems aside, the Notice of Termination essentially requires the client – and accessible beneficiaries – to retain a second attorney to review the documents so that the statute does not lapse before the malpractice is discovered. This additional cost to clients and beneficiaries is unjustified.

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[1] Some have suggested the establishment of a new fund, similar to the Client Security Fund, which would be used to reimburse clients who have been injured by estate planning malpractice but are unable to recover from their attorney due to the statute of repose. They propose that contributions to the fund would be voluntary, but the statute of repose would only apply to attorneys who contribute. We would note that to be fully effective, such a new fund must extend to the full range of malpractice and cover attorney negligence, not merely dishonesty and fraud. In addition, any such fund should not place a cap on the amount that a victim could be reimbursed.

Even more troubling, the statute of repose and the notice-triggered time limit could actually encourage individuals to delay estate planning until they believe they are approaching death, so that they can preserve their beneficiaries' right to sue for common law malpractice. This could result in a large population of individuals who die without wills or trusts because they were waiting until the eleventh hour to have an attorney draft the estate plan. It could also mean that many individuals who form estate plans will be incompetent or incapacitated because they will wait until they are faced with a life-threatening illness to develop an estate plan.

Comments from estate planners suggest that their proposed exceptions would apply to a very small and discrete subset of malpractice cases. Although the estate planners would have this Commission believe that the exception would be only infrequently invoked, data from the American Bar Association Standing Committee on Lawyers' Professional Liability refutes this assertion. According to the committee's survey, *Legal Malpractice Claims in the 1990's*, malpractice claims in the estate, probate and trust area accounted for 7.59 percent of all malpractice claims from 1990-95. Estate planning malpractice ranked seventh of 25 areas analyzed, but the increase from the 1983-85 figures to the 1990-95 figures was the sixth greatest. Therefore, the estate planning area contributes significantly to the overall number of malpractice claims, and any new exception would be invoked frequently.

Not only do estate planning errors account for a large portion of malpractice claims, they also are responsible for creating perhaps the most profound financial impact on victimized individuals. When someone seeks the assistance of an attorney to draft an estate plan, rather than relying on self-help materials, the estate is typically complex and quite valuable. An error by an attorney can have massive fiscal consequences. With so much at stake, it would be manifestly unfair to change the law so that fewer clients and beneficiaries can bring claims against careless estate planners.

In addition to the profound financial consequences of estate planning error, the CLRC should also weigh the extreme emotional impact of this particular form of malpractice. Imagine the pain of an individual losing a loved one, discovering that an incompetent attorney made a major error 10 years ago in the loved one's estate plan and being deprived of funds the loved one intended for the individual to receive, and then, adding insult to injury during this most difficult time, being prohibited from filing any claim against the unscrupulous attorney simply because of a new, lawyer-inspired exception in the statute of limitations.

III. State Bar Programs Do not Provide Viable Alternatives for Victims Time-Barred from Bringing Malpractice Claims.

Unfortunately, if a statute of repose or a notice-triggered time limit were to bar a harmed client or beneficiary from filing an action for malpractice, the individual would not be able to find alternative forms of recourse through state bar programs.

One suggestion made in CLRC Staff Memorandum 2003-14 is to allow time-barred plaintiffs to seek compensation through the state's Client Security Fund. However, the Client Security Fund, under California Rules of Procedure, does not reimburse individuals for losses arising out of the negligent or incompetent actions of an attorney. Instead, the fund only compensates for losses resulting from an attorney's dishonesty or fraud. Therefore, in most cases, the Client Security Fund provides no alternative to an individual who has been time-barred from bringing a legal malpractice action.

The attorney discipline system would also be unable to offer monetary relief to victimized clients and beneficiaries. As a rule, California's discipline system, like disciplinary bodies in most states, does not offer restitution to complainants. Even if a client simply wished to see sanctions imposed upon an unscrupulous attorney, our research demonstrates that the state bar rarely metes out discipline. According to the most recent statistics from the American Bar Association's Survey on Lawyer Discipline Systems, only four percent of investigated cases led to formal discipline in 2001.[2]

Without the opportunity to collect restitution through California's Client Security Fund or the attorney discipline system, clients and beneficiaries who are time-barred from bringing malpractice actions would simply be out of luck.

IV. A Statute of Repose would be a Radical Departure from Current California Law and the Laws of the Vast Majority of States.

A new statute of repose in the isolated area of estate planning malpractice would contradict long-established California jurisprudence disfavoring such statutes. In addition, this new exception would be at odds with the California statute of limitations

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[2] In addition, HALT's 2002 Lawyer Discipline Report Card, a comprehensive evaluation of attorney discipline systems nationwide, found that California's system is remarkably unresponsive to consumers. The state received particularly low marks for featuring a confusing automated telephone system that prevents consumers from obtaining prompt answers to specific questions from the agency. California's discipline system offers little recourse to individuals who would be time-barred from bringing lawsuits against careless estate planning attorneys.

governing medical malpractice, which tolls until discovery of injury. A statute of repose also runs contrary to the laws of the vast majority of states and would put California in the tiny minority of jurisdictions, such as North Carolina and Montana, which severely curtail clients' rights.

A. California has rejected statutes of repose in nearly all contexts.

As Ellen Nudelman states in her CLRC staff memorandum, California law generally looks unfavorably upon statutes of repose (Comments of Ellen Nudelman, Exhs. 81-82). As Ms. Nudelman points out, the few clear statutes of repose that exist in California are specific to property and isolated securities law matters. Specifically, sections 337.2 and 339.5 of the California Code of Civil Procedure provide for statutes of repose for breaches of unwritten leases and abandonment of property. The statute of repose in section 349.2 applies to lawsuits contesting the validity of authorization, issuance and sale of bonds by public utilities.

While these statutes do not require actual injury, they do apply in contexts where an aggrieved party would be likely to discover injury before the statute of repose lapses. If property is abandoned, for example, a landlord will likely notice this and be able to sue the wrongful tenant before the two-year statute of repose expires. Similarly, the bonding process has a built-in timing component – the point of sale – that acts as a trigger for scrutiny.

In the context of estate planning malpractice, however, it is unlikely that most clients and beneficiaries would have the opportunity to discover error before the occurrence of actual injury. As stated earlier, in many cases, beneficiaries would not even have been born or of adult age by the time the proposed statute of repose would lapse.

California's law makes it clear that statutes of repose should only govern cases where injury is easily discovered prior to the statute lapsing. Estate planning malpractice represents the antithesis of this rule – for discovery of malpractice usually occurs after the client's death.

B. A statute of repose would run contrary to California's general malpractice jurisprudence.

California's current statute of limitations for legal malpractice clearly conforms with the principles behind California's statute of limitations for medical malpractice. Despite minor differences of language in Code Civ. Proc. § 340.5, applicable to medical malpractice actions, and Code Civ. Proc. § 340.6, applicable to legal malpractice, the statute of limitations in both laws commence only once the plaintiff has suffered the effects of the injury. The establishment of a statute of repose for estate lawyers, which

would effectively have the statute of limitations start to run from the time in which a document is drafted, would contradict a well-established rule in California's malpractice law.

Code Civil Procedure §340.5 provides:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the *date of injury* or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Cal. Code Civ. Proc. § 340.5 (emphasis supplied).

California courts have clearly established that the phrase "date of injury" refers to when the plaintiff becomes "aware of the physical manifestation of the injury" (*Hills v. Aronsohn* 152 Cal App 3d 753 (1984)). In *Hills*, a patient had to undergo surgery after detecting lumps in her skin that developed due to a previous negligent breast implant. The court held that the three-year statute of limitations started running once the plaintiff noticed the physical manifestation of her injury. See also *Steingart v. Oliver*, 243 Cal. Rptr. 678, 682 (1998) (where the statute of limitation commenced only with the diagnosis of a disease); see also *Larcher v. Wanless* 557 P.2d 507, 512 (Cal. 1976) (where the statute of limitation began at the death of the mistreated patient).

Estate lawyers might respond that medical malpractice cases cannot be compared to legal malpractice because medical error is usually manifested sooner than an error in the writing of a will or trust. However, the same definition of a "date of injury" has been used even in cases where a medical error was only discovered after an extensive period of time. *Martinez-Ferrer v. Richardson-Merrel*, 164 Cal. Rptr. 591, 595 (1980). In *Martinez-Ferrer*, a patient was given medication that caused an initial temporary irritation and dermatitis, but also caused the plaintiff to develop cataracts in his eyes 16 years later. The court held that his claim brought after developing of the cataracts was still within the three-year statute of limitations, even though it came 16 years after the doctor prescribed the medication.

A statute of repose exception for estate planning malpractice would therefore run contrary not only to the general statute of limitations rule for legal malpractice, but also the California statute for medical malpractice.

C. Only four states have adopted statutes of repose such as the one advocated by the estate planners.

The vast majority of states do not have statutes of repose for estate planning malpractice. In her June 13, 2002 memorandum to the CLRC, Ms. Nudelman discusses seven states – North Carolina, Alabama, Montana, Illinois, Louisiana, South Dakota and Connecticut – where she has found statutes of repose (Comments of Ellen Nudelman, Exh. 82).

While these seven states do have such statutes on the books, North Carolina, Montana, Louisiana and Connecticut impose rigid statutes of repose; the remaining states sharply limit the applicability of their statutory schemes.

Illinois' statute of repose for legal malpractice provides an exception for estate planning malpractice. Subsection (d) of Illinois Code of Civil Procedure section 13-214.3 provides that the statute of repose is inapplicable to an injury that does not occur until the client's death. Therefore, if the injury occurs after a client's death, a plaintiff may still bring a legal malpractice action against an estate planner so long as she brings her suit within the general statute of limitations.

A literal reading of Alabama's statute of repose, Ala. Code 175 § 6-5-574, allows a maximum four year limit on legal malpractice commencing from the date of the act, omission or failure giving rise to the claim. However, in practice, courts have historically interpreted the Alabama Legal Services Liability Act as allowing time limits to be measured from the date of accrual of an action and not from the occurrence or omission, as the Act's language might indicate. In recent years, the Alabama Supreme Court has upheld both the "accrual" and "occurrence" approaches, so the meaning of the statute remains unclear (*Floyd v. Massey*, 807 So. 2d 508 (2001).

South Dakota allows its statute of repose to toll through its doctrine of continuous representation. Under this doctrine, the statute tolls until the attorney-client relationship ends, which is marked by the last bill sent to the client. Therefore, the state's statute does not operate as a "true" statute of repose. So long as the client continues to update her will, for example, the statute is tolled.

Thus, only four states enforce pure statutes of repose for legal malpractice arising out of estate planning error.

Conclusion

HALT respectfully requests that the CLRC resist the estate planners' self-interested appeal to severely curtail the current statute of limitations. Carving out a special exception for estate planning malpractice would leave most clients and beneficiaries without any recourse against unscrupulous and incompetent estate planners. It would also represent a radical change in California law and place California in a very tiny minority of states that artificially curtail clients' rights. Charged with helping the legislature to implement *needed* reforms, the CLRC should reject the estate planners' unnecessary and harmful recommendation.

Respectfully submitted:

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September 3, 2003

Attn: Barbara Gaal
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Palo Alto, CA 94353-4739

Dear Madam:

The California Trusts and Estates Quarterly which I received this week contained an article dealing with a Statute of Limitation for legal malpractice in estate planning. It is my understanding, from this article, that the California Law Revision Commission is considering a proposal to limit the period of time in which an estate planning attorney will be held liable for an erroneously drafted Will or Trust. It indicated that a current proposal would require that an estate planning lawyer send a notice to the client of the completion of work with the information that a claim would need to be asserted by the client or the beneficiaries within five to seven years. An alternative proposal would provide for a "statute of repose" of seven to ten years following completion of the estate planning project.

I would suggest that a "statute of repose" would be the appropriate approach. Based upon my work in the general practice of law, I have concluded that advising anyone that he or she has a right to file a claim within a given period of time substantially increases the likelihood that the individual will consider filing a claim even though he or she might not otherwise be inclined to do so. Giving notice to clients of the ability to file a claim is really an "open invitation" to the making of claims against attorneys.

Each estate plan involves a balancing of many factors and goals of the client. Often, the client's goals at one time will be totally different from that client's goals at a later time. Circumstances in place at one time may change dramatically a short time later. In hindsight, a good estate plan based upon information given to the attorney at the time of its creation can become a disaster a short time later.

Attorneys routinely suggest to clients that they review their estate plans every few years or earlier if there are changes in their estate, their family situation, or the law. An attorney cannot be expected to keep in mind the circumstances of every individual for whom he or she has created a Will or Trust

or to whom he or she has given estate planning advice. The client must shoulder responsibility for keeping the estate plan up to date. I would suggest that an appropriate approach would be to use a "statute of repose" with a five year limitation. This would be consistent with the commonly given advice that estate plans should be reviewed at least every five years.

Thank you for considering this matter.

Very truly yours,

Gordon R. Lindeen

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Enclosure
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FILE NO. 7048395

October 17, 2003

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Law Revision Commission Study of Statute of Limitations for Legal Malpractice

Dear Ms. Gaal:

I am late in meeting your request date of October 15, stated in your letter of June 19. Hopefully, my comments can be considered and are useful.

Having drafted the prototype article for what became Code of Civil Procedure Section 340.6 and litigated claims, mostly on behalf of lawyers, for over 30 years, I have a great interest in this study by the Commission. If I have bias, it is to have a statute of limitations that is effective. Effective is in the proverbial eyes of the holder. Section 340.6 attempted to provide a balance between the right of an injured person to pursue a remedy and for lawyers not to have to litigate stale claims. Various other policies come into play, and, most recently, the tightened and extraordinarily limited and expense market for legal malpractice insurance has affected all practicing lawyers.

The statute of limitations innovated in American statutory law with a one-year discovery limitation period and a four-year occurrence limitation. I have not seen criticism of the one-year period, which is sufficient time for one, who knows or should know of the alleged wrong, to file suit. In my experience and in the reported case law, the four-year period has rarely been invoked, because discovery usually precedes that time, and the need for "actual injury," which can defer the statute of limitations.

Admittedly, the one "class" of lawyers, who have suffered with seemingly open-end liability, are the estate planners. The client for whom the estate is prepared is subject to the four-year limitation period, because that person suffers actual injury in the form having paid for legal services for a legal product that fails to meet the goal of the representation. In contrast, the usual

claimant, a beneficiary, suffers no injury until a contingent event, typically the death of the testator or testatrix. Until the time, usually, the estate plan can be changed.

Apparently, an attempt was made to deal with the estate planning lawyer by the legislature in adding:

> (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

That provision always has been uncertain in its meaning and hardly achieves any legitimate goal. The concerns about stale evidence are very common when estate planning lawyers are sued, when almost invariably the client is dead, and, because of the long passage of time, the lawyer may be dead. Issues of what evidence is admissible, if it can be found, are exceedingly problematical, when the plaintiff-heir says, "This is what my father wanted to do."

I have noted various recommendations in the materials you provided. None appeal to me. Some involve a virtual (if not literal) "passing" the client from lawyer to lawyer like the proverbial "hot potato."

Is there a solution that is fair? One concept is to provide an alternative occurrence limitation unaffected by the need for actual injury, which adequately contemplates a reasonable time for most estate planning documents to become effective. This is an arbitrary cutoff, but statutes of limitation are, by definition, arbitrary.

An alternative and more balanced approach would likewise require legislative assistance. The concept is an occurrence limitation for a specific time period, predicated upon the attorney providing an express, written statement that the client should seek review at that time. The fact is that estate plans should be reviewed periodically, because law and the economic situation of the clients change over time. Not being an estate planner, I do not know what the time period should. Of course, any time period would be an approximation and in that some not necessarily appropriate to all estate plans. On the other hand, some estate plans, probably should be reviewed earlier.

For example, assume that estate plans should be reviewed every ten years. The statute would provide a ten-year occurrence limitation, without the need for actual injury, from the date of alleged wrongful act or omission. The condition for the statute would be the existence of a writing (may be a clause in the estate plan document), which informs the client that the estate planning documents should be reviewed at the end of that time and that the attorney's legal responsibility concludes at that time.

Of course, some will contend that such a proposal is intended to generate legal work for lawyers and unfairly protects lawyers. The latter criticism is true, but is the nature of a statute of limitations, offset by the other policy considerations I have noted. As to the first concern, if my

understanding of estate planning is correct, then formalizing the desirability of estate planning review would ultimately be beneficial for the public.

There are no right or wrong answers to drafting a statute of limitations. I agree with the concerns of estate planners about the seeming indefinite liability. I have seen and litigated the problems that arise from claims made for estate plans drafted over a decade and sometimes, two decades ago.

Very truly yours,

HINSHAW & CULBERTSON

By:_____
Ronald E. Mallen

REM:smh

2903563v1 7048395

COMMENTS OF DAVID MIKOLAJCZYK

Date: February 25, 2004
To: <commission@clrc.ca.gov>
From: David Mikolajczyk <persistent61@sbcglobal.net>
Subject Statute of limitations for actions based on estate planning malpractice

Message: I am in opposition to the recommendation to restrict statute of limitations for actions based on estate planning malpractice. 1) the estate planners have not demonstrated any need for this change in California Law, 2) exposure to malpractice lawsuits should be reduced by developing careful and prudent work practices just like all other professions, not by precluding injured clients and beneficiaries from bringing legitimate lawsuits, 3) the cost of extending insurance coverage does not justify the need for a statute of limitations that would prematurely bar harmed clients and beneficiaries from bringing malpractice actions, 4) California law already limits an attorney's malpractice exposure to within one year of attorney's , 5) the asserted difficulty of litigating a state claim is a false concern because capable estate planners keep their records up to date, 6) the current state of limitations is anything but "a threat to the public," 7) far from demonstrating the necessity of a shortened statute of limitations, the comments of estate planners amount to little more than exaggerated and speculatinve fears, 8) the estate planning, trust and probate law sections's proposal unduly prejudices the rights of injured clients and beneficiaries, 9) state bar programs do not provide viable alternatives for victims time barred from bringing malpractice claims, 10) California has rejected statutes of repose in nearly all contexts, 11) a statute of repose would run contrary of California's general malpractice jurisprudence

☛ Some spelling and typographical errors in this message have been corrected.

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March 15, 2004

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto Ca 94303-4739

Re: Law Revision Commission study of statute of limitations for legal malpractice

Dear Ms. Gaal:

For approximately 15 years my practice has involved, almost exclusively, the representation of clients in legal malpractice lawsuits against lawyers. Over the years, I have handled a number of cases against estate planning lawyers involving a variety of issues.

Based upon my background and experience, I wish to advise the Law Revision Commission of my strong opposition to a proposal to dramatically change the statute of limitations for trusts and estates lawyers. First, I believe the special proposals will severely harm clients and consumers of legal services in California. Second, I do not believe estate planning lawyers should receive such special treatment in the form of a dramatic change in the current statute of limitations. In fact, given the fact that defects and estate plans are generally not discoverable until a client's death and probate of the estate, I believe estate planning attorneys should be subject to the same statute of limitations as all other attorneys. Finally, in my opinion, the current proposals under consideration are inconsistent with the California Supreme Court's recent ruling in the case of *Viner v. Sweet,* 30 Cal.4th 1232 (2003).

As a result, I strongly urge the Commission to reject efforts to provide a special statute of limitations for estate planning attorneys. Please do not hesitate to contact me if you desire further information.

Very truly yours,

STANFORD AND ASSOCIATES

Dan L. Stanford jc

Dan L. Stanford

DLS:jc

San Francisco Daily Journal, Jan. 30, 2004, p. 4

Death Trap

Protecting Estate Planners From Malpractice Suits Will Hurt Clients

By James C. Turner and Suzanne M. Mishkin

In a proposal of breathtaking scope, State Bar members are pushing new approaches that effectively would immunize estate planners from malpractice liability. To avoid what is, at best, a speculative exposure, the bar's trusts and estates section is trying to change drastically the rules for filing legal-malpractice actions arising out of estate-planning negligence.

Current law tolls the statute of limitations for legal-malpractice actions until a plaintiff sustains actual injury. In the estate-planning context, this usually occurs at probate. At that point, a plaintiff must file suit within a year of when he or she discovers, or should have discovered, the facts constituting the attorney's wrongful act or omission, or within four years from the date of the wrongful act or omission, whichever occurs first.

Eager to shield themselves from liability after they have drafted a trust or will, estate planners are urging the California Law Revision Commission, a group charged with proposing needed reforms to the state Legislature, to recommend a special statute of repose exception for estate-planning malpractice. Under a statute of repose, victimized plaintiffs would have only a few years after the drafting of an estate plan — the proposals range from five to 10 years — to bring a legal-malpractice action.

In the alternative, estate planners recommend a notice-triggered time limit. Under this scheme, an estate planner would send the client a letter terminating the attorney-client relationship and triggering a four-year period to file suit for malpractice. Beneficiaries would receive no notice.

Estate planners recommend carving out these special exceptions for estate-planning malpractice without demonstrating any real need for the radical measures. In proposing these arbitrary departures from current law, estate planners dismiss the fact that their proposed statute of repose would lapse before most clients or beneficiaries would be able to detect attorney errors.

As estate planners well know, defects in estate plans generally are not discoverable until a client's death and probate of the estate. In many cases, a statute of repose would lapse before beneficiaries are even born or of adult age. And a notice of termination would inform only clients of the urgent need to check their estate plans for errors; beneficiaries would be left in the dark.

In addition, the proposal is inconsistent with the Supreme Court's recent ruling in *Viner v. Sweet*, 30 Cal.4th 1232 (2003), which held that victims of transactional malpractice must demonstrate that they would have achieved a better result than the result that actually occurred. The estate planners' proposal requires clients and beneficiaries to prove the impossible: The attorney's negligence led to a negative result when, in actuality, no result has occurred. The estate planners' recommendation, coupled with the Supreme Court's decision, effectively precludes victims of estate-planning negligence from recovering.

Refusing to acknowledge that malpractice suits are rarities, estate planners instead groundlessly suggest that these claims are a common occurrence caused by clients and beneficiaries who are innately litigious and inclined to bring frivolous lawsuits.

We at HALT Inc., an organization that hears every day from individuals who have suffered from attorney misconduct, know that malpractice suits are rarely frivolous. If anything, malpractice is underprosecuted because of the difficulty of finding a plaintiff-side legal-malpractice attorney. We regularly hear from California legal consumers, particularly those in rural communities, who cannot find an attorney willing to sue another attorney.

Clients and beneficiaries do not bring malpractice actions simply because they have a whim to sue estate planners.

In addition, many injured clients and beneficiaries realistically cannot consider a malpractice case because they realize that the standard for proving malpractice is so demanding. To recover damages in a transactional malpractice case, including estate-planning malpractice, plaintiffs must prove that, but for their attorney's negligence, they would have achieved a better result. Under this rigorous requirement, only cases of egregious misconduct lead to plaintiffs' judgments.

Clients and beneficiaries do not bring malpractice actions simply because they have a whim to sue estate planners; they bring such suits only when the harm caused by an attorney is so severe that it justifies the immense effort and expense required to litigate a lengthy malpractice action.

Many estate planners protest the "unfair" expense of professional-liability insurance. One attorney recently told the commission, "[T]wenty years later, I still have to worry about the hundred or so estate plans I worked on as a fledging associate! And unless you do something about it, I will have to worry about it twenty years hence!" She complained that the "specter of that Sword of Damocles still hanging over my gray and trembling head twenty years from now is not pleasant."

The problem is not the expense of malpractice insurance; the problem occurs when attorneys draw up estate plans, legal instruments that are often the most important and precious to clients and families, without possessing the requisite skill and experience or exercising the necessary care. The state should not dramatically alter the statute of limitations for legal malpractice to immunize the errors of inexperienced and incompetent attorneys.

A shortened statute of limitations or a notice-triggered time limit could encourage individuals to delay estate planning until they believe that they are approaching death, so that they can preserve their beneficiaries' right to sue for common-law malpractice.

This could result in a large number of individuals who die without wills or trusts because they were waiting until the eleventh hour to have an attorney draft the estate plan. It also could mean that individuals who form estate plans will be incompetent or incapacitated because they will wait until faced with a life-threatening illness to develop an estate plan.

Estate-planning errors are responsible for creating perhaps the most profound financial impact on victimized individuals. When someone seeks the assistance of an attorney to draft an estate plan, rather than relying on self-help materials, the estate is typically complex and quite valuable. An attorney error can have massive fiscal consequences. With so much at stake, changing the law so that fewer clients and beneficiaries can bring claims against careless estate planners would be manifestly unfair.

Unfortunately, if a statute of repose or a notice-triggered time limit were to bar a harmed client or beneficiary from filing a malpractice action, the individual would not be able to find alternative forms of recourse through State Bar programs.

Under the California Rules of Procedure, the Client Security Fund does not reimburse individuals for losses arising out of an attorney's negligent or incompetent actions. Instead, the fund compensates only for losses resulting from an attorney's dishonesty or fraud. Therefore, in most cases, the fund provides no alternative to an individual who is time-barred from bringing a legal-malpractice action.

The attorney-discipline system also would be unable to offer monetary relief to victimized clients and beneficiaries. As a rule, California's discipline system, like disciplinary bodies in most states, does not offer restitution to complainants.

Even if a client simply wished to see sanctions imposed on an attorney, research demonstrates that the State Bar rarely metes out discipline. According to the most-recent statistics from the American Bar Association's Survey on Lawyer Discipline Systems, only 4 percent of investigated cases in the United States led to formal discipline in 2001.

Without the opportunity to collect restitution through the Client Security Fund or the attorney-discipline system, clients and beneficiaries who are time-barred from bringing malpractice actions would simply be out of luck.

A statute of repose in the isolated area of estate-planning malpractice also would contradict long-established California jurisprudence disfavoring such statutes. California's law makes clear that statutes of repose should govern only cases in which injury is easily discovered before the statute lapses. Estate-planning malpractice represents the antithesis of this rule, for discovery of malpractice usually occurs after the client's death.

In addition, this new exception would be at odds with the state statute of limitations governing medical malpractice, which tolls until discovery of injury. A statute of repose also runs contrary to the laws of the vast majority of states and would put California in the tiny minority of jurisdictions that severely curtail clients' rights.

Responsible members of the bar should urge the Law Revision Commission to oppose the estate planners' radical proposal vigorously. As a progressive state with a long-standing reputation for protecting consumers, California should resist the estate-planning bar's efforts to artificially curtail clients' rights.

Instead, estate planners should have to meet the same liability tests that cover lawyers who practice in other areas. This is one special pleading that should be thrown out of court.

James C. Turner is executive director and **Suzanne M. Mishkin** is associate counsel of HALT Inc. in Washington, D.C. HALT is a national, nonprofit public-interest group working to improve access and accountability in the civil justice system.

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September 23, 2003

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Law Revision Commission study of statute of limitations for legal malpractice

Dear Ms. Gaal:

Thank you for your request for my opinion regarding changing the statute of limitations for estate planning malpractice. While I certainly understand the issue from the practitioner's point of view (many of my law partners are estate planning lawyers), from the point of view of the consumer of legal services (or the heirs and beneficiaries of the consumer) it defies logic to shorten the statute of limitations to a time when the manifestation of the malpractice is still many years from discovery. Any change in the law would have to accommodate a tolling period at least as long as a testator's life, for example. In most instances, until a testator dies, there is no way to determine whether the estate planner's work has caused any damage, whether or not it was within the standard of practice. There would ostensibly be no need to "check" the estate planner's work during the lifetime of the testator. Should a malpracticing lawyer not be held accountable for substandard practice simply because his or her mistakes were unknown until probate of a will or until a trust becomes irrevocable?

It appears from the documents you provided to me that the biggest concern of estate planners is the cost of obtaining malpractice insurance and "tail" coverage. Yet the proposed solutions from the estate planning bar seem mainly to deal with limiting the liability of attorneys and necessarily short-changing potential plaintiffs. Instead, I believe, the focus should shift to the liability insurance carriers. Suppose all of the suggested "reforms" are passed, and liability of estate planning attorneys is limited to a time period short of when their malpractice might be discovered. Is there some guarantee on the part of insurance carriers that the premiums would automatically be reduced?

One only has to look at the disastrous MICRA provisions in California law, limiting liability of health care professionals, to see that passing the burden to injured plaintiffs is not the answer to lower malpractice premiums. MICRA has resulted in countless numbers of

legitimately injured people being unable to receive just compensation for their injuries. **It has not caused malpractice insurance premiums for health care professionals to diminish in the slightest. In fact, California's medical malpractice insurance premiums are the highest in the nation, and have been for years.** Any revisions in the law that are made in anticipation that malpractice premiums will somehow diminish would be in vain, in my opinion, unless the revisions are tied with some "caps" on premiums in exchange. Good luck in getting the carriers to agree to that....

There are numerous ways for estate planning practitioners to avoid malpractice liability, most notably by practicing within the applicable standard of care. If estate planners are concerned about clients not coming back for will or trust revisions in a timely manner, they can protect themselves by sending letters at the end of their representation to the effect that whether or not the client returns to that lawyer, an estate plan should be reviewed every five years in order to ascertain that it remains the best avenue of maintaining assets for the individual client. Likewise, the lawyer could send periodic reminders to clients about updating or revising estate planning documents. Both of these avenues would certainly serve to mitigate a lawyer's exposure to claims, or at least to shift some of the responsibility for maintaining current onto the client.

Shifting the burden of malpractice to clients by artificially shortening the statute of limitations should be a plan of last resort, and in any event, is no panacea for the problem of the rising cost of malpractice insurance. Until the law is changed to disallow insurance carriers from shifting responsibility for poor investment decisions to their insured, there doesn't seem to be any just solution to the problem posed in your letter.

Very truly yours,
NUGENT & NEWNHAM

By Deborah A. Wolfe

DAW/hp